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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD KELLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Where government officials originate and design the crime charged and induce the Defendant, a person otherwise innocent, to commit the offense, is such conduct so outragous that due process principles would bar the government from invoking the judicial process to obtain a conviction?

2. Is it necessary that the aforementioned conduct of government officials involve "the infliction of pain, violence, or brutality to the person, or coercion" in order for their conduct to be so outrageous that due process principles would bar the government from invoking the judicial process to obtain a conviction?

3. Is "virtue testing" or "prosecution for the sake of prosecution" by federal law enforcement officials, as a part of the process of manufacturing crime, where no crime or criminal design existed prior to the action of the government officials, a violation of the due process rights of the subject of the test and does it constitute conduct so outrageous that it would bar the government from invoking judicial process to obtain a conviction?

4. Is the public policy consideration the same in a case where government officials are conducting their activities in connection with existing or ongoing crime that antedated their activity, as in a case where there was no crime prior to the action of the officials and the Defendant was an otherwise innocent person?

5. Where a question regarding a ruling of the lower court is essential to the disposition of an appeal on a constitutional point urged by an appellee, and appellant is not contesting appellee's contention regarding the ruling of the lower court, may the appeals court refuse to remand on the assumption that the lower court did not rule as the parties contend?

6. Where Federal law enforcement officials were engaged in the "manufacture of crime" or "virtue testing," where no crime or criminal design existed, used a convicted felon and professional con man to whom they promised "big money" and used him to design the crime to be created and the scheme for testing the subject to be tested and to recruit and "steer in large part" other con men to assist in the scheme and the government gave him great discretion to select the evidence he preserved on audio tape and placed no limits on the inducements he could offer or use as a goad in recruiting or managing the other con men used to bring the Defendant into the scheme for "testing," and the government used prejudicial pretrial statements from high officials and released video tapes, exclusively in their control, to the media prior to the trial, does this constitute conduct so outrageous that due process principles would bar the government from invoking the judicial process to obtain a conviction?

7. Are Federal officials authorized to engage in "virtue testing,"or the "manufacturing of crime," on the basis that "public servants" are "plagued by the frailties of human nature,""dishonest public officials . . . may cause grave harm to our society" and official corruption is "difficult to detect" where the government produced no evidence showing ongoing or existing crime or that the defendant was engaged in crime or had a criminal design prior to the government's activity or inducement?

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v.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner Richard Kelly respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia entered in this case on June 27, 1983.

OPINIONS BELOW

The opinion of the court of appeals reversing the district court is reprinted as Appendix A and is reported as *United States* v. *Kelly*, 707 F. 2d 1460 (D.C. Cir. 1983). A timely petition for rehearing was denied on June 27, 1983, in an order reprinted as Appendix B. The Order of the district court granting Defendant's motions for judgment of acquittal and to dismiss the indictment filed May 13, 1982, is reprinted as Appendix C. The opinion of the district court granting said motions is reprinted as Appendix D and is reported as *United States* v. *Kelly*, 539 F. Supp. 363 (D.C. 1982).

JURISDICTION

The timely petition for rehearing was denied on June 27, 1983. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution
Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

The Petitioner was tried and the jury returned a verdict of guilty. Prior to the trial the Defendant filed a motion to dismiss the indictment on due process grounds. The district court deferred ruling on this motion until after the trial. After the trial this motion was renewed along with a renewed motion for a judgment of acquittal on various grounds including entrapment as a matter of law. The Petitioner also filed a posttrial motion for a new trial.

The trial court entered its order of May 13, 1982, (App. C) granting the judgment of acquittal and dismissing the indictment and filed a memorandum opinion (App. D). No ruling was made on the Petitioner's motion for new trial.

In summary, the trial court found that government conduct as it affected the Petitioner was not the generally accepted carefully devised and supervised covert operation. Rather legal and illegal bait was used to persuade the Petitioner through the use of middlemen. The district court found that the government had no reason to believe that the Petitioner was responding to the illegal bait and that the sole objective of the operation was virtue testing or prosecution for the sake of prosecution, patently un-

acceptable. *United States* v. *Kelly*, 539 F. Supp. at 371-373.

The government appealed. The Petitioner then filed a motion to dismiss the appeal on the ground that the government's appeal constituted double jeopardy. The Petitioner based this motion in part on the ruling of the trial court that as a matter of law the Petitioner had been entrapped. The government did not contend the district court had not so ruled. In its brief filed before the appellate court the government in fact stated:

> Nevertheless, the court found that Kelly initially had spurned the offer, that there was no 'credible evidence' that his rejection was insincere, and that the agents thereafter engaged in 'repeated urgings' (App. 30, 35) that resulted in his acceptance of the bribe. It is hard to conceive of a case in which the court more clearly substituted its own view of the evidence for the facts as found by the jury. Remarkably, the court did so without professing to disturb the jury's finding with regard to entrapment. Gov. Brief pp. 39-40.

Further, the government noted that:

> It is not free from doubt, however, wnether the court was not in fact finding entrapment as a matter of law. The court both dismissed the indictment *and* acquitted Kelly. While at some places in its opinion it treated the issue of predisposition—the central question under entrapment—as irrelevant ("[t]he statutory scheme precludes even the predisposed from committing the crime under real-world circumstances after the target makes one refusal" (App. 35)), its due process ruling rests squarely upon a determination that Kelly rejected the bribe offer initially and succumbed only after repeated inducement. Gov. Brief p. 40, fn. 30. (emphasis in original)

Nevertheless, the appellate court concluded the district court had ruled only on the question of due process and

denied Petitioner's motion to dismiss the appeal and refused to remand the case to the trial court to resolve this question concerning the lower court's ruling. *United States* v. *Kelly*, 707 F. 2d at 1468 fn. 48 (MacKinnon); 1474 fn. 3 (Ginsburg) (App. A).

Portions of two separate opinions by the panel of the court of appeals comprised the court's decision. The majority of the court predicated its decision not upon a rejection of the findings of the trial court concerning virtue-testing or prosecution for the sake of prosecution. Rather the court of appeals found as a necessary element of the due process defense that there be physical coercion or brutality. *United States* v. *Kelly*, 707 F. 2d at 1476 (Ginsburg). Therefore, the court felt constrained to reverse. *Id.* 1477 (Ginsburg).

This Petition timely followed after the court of appeals' denial of Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc.

REASONS FOR GRANTING WRIT

I. *The Decision Of The Court Of Appeals Reverses The Opinions Of This Court Because It Approves The Police Techniques Used In The Instant Case Merely On Grounds That The Class Of Crime Charged Is Declared Hard To Detect Without Regard To The Lack Of Existing Crime Or Criminal Design.*

The court of appeals, in direct conflict with the opinions of this Court, in *Sorrells* v. *United States*, 287 U.S. 435 (1932); *Sherman* v. *United States*, 356 U.S. 369 (1958); *United States* v. *Russell*, 411 U.S. 423 (1973); and *Hampton* v. *United States*, 425 U.S. 484 (1976), held that the mere fact that a class of crime is declared difficult to detect, justifies the involvement of police officials in the manufacture of crime to the extent that they were in-

volved in the instant case. *United States* v. *Kelly*, 707 F. 2d at 1474 (MacKinnon).

This Court in *Sorrells* held that the authority to use such police activity was "given for the purpose of detecting and punishing crime . . . to reveal the criminal design." *Id.* 441-442. This Court did not sanction such historically dangerous police activities simply because a particular class of crime was declared difficult to detect. The authority is given because crime *exists* and poses a threat to the public and may be otherwise difficult to detect.

The existence of crime or criminal design prior to the actions by the police is an essential basis for the use of such police authority. Otherwise this Court in *Sorrells*, *Sherman*, *Russell* and *Hampton*, would have authorized the use of such police activity for virtue testing and as a device for the creation of crime. The control this established was a balance between protecting the public from lawless and dangerous police activity, *United States* v. *Jannotti*, 673 F. 2d 578, 612-613 (3d Cir. 1982), *(en banc)* and making such police techniques available to protect the public on a need basis.

The existence of crime is the safeguard. If the crime does not exist, the public has no need for this "protection" which infringes on individual rights. The policy this Court established in *Sorrells*, *Sherman*, *Russell* and *Hampton*, imposed at least the burden of finding crime or ciminal design if it did not require knowledge of its existence before such techniques (creation of crime) were commenced.

The precedent established by the decision of the court of appeals, provides that if the police can argue that a particular class of crime is difficult to detect, they can use the power and resources of government to induce crime

and then justify the conduct by the crime they create. This Court has not recognized such a rule, which is abhorrent to our system of justice and contrary to the prior decisions of this Court.

II. ***The Appellate Court Reverses Decisions Of This Court By Authorizing "Virtue Testing" And "Prosecution For The Sake Of Prosecution" On The Grounds That The Classification Of The Crime Involved Is Difficult To Detect Without Regard To The Lack Of Existing Crime Or Criminal Design.***

The court of appeals reversed the opinions of this Court in *Sorrells*, *Sherman*, *Russell* and *Hampton*, by justifying the police action in the instant case on the basis of the crimes the government created as opposed to crimes the government revealed. The appellate court literally washes away all of the struggle of this Court in its opinions to balance the various public needs. In *Sorrells*, the Court held when no crime existed and the government uses its power to create crime, there is a "gross abuse" of the government's power. *Id.* 441. In *Sherman*, the Court held that such police conduct is as inconsistent with the law as the "coerced confession or the unlawful search." *Id.* 372.

The trial court in the instant case found that the federal government manufactured the crime and that they engaged in "virtue testing" or "prosecution for the sake of prosecution." *United States* v. *Kelly*, 539 F. Supp. at 373. The court of appeals justified the dangerous techniques used by the police in this case on the basis that the police were successful in creating a crime, that the classification of the crime was declared "difficult to detect" and that the police did not beat the petitioner or commit brutality to his person. The requirement of *Sorrells* that such techniques be used only to reveal *existing* crime went by the way.

In addition to being illegal, "virtue testing" causes other due process concerns as: such tests are not given to all individuals; such tests are not all administered equally or uniformly; all individuals subjectively are not on an equal footing to take the test; and the surrounding circumstances in which the test is administered are not equal.

By condoning the government's conduct on the basis of alleged difficulty in detection the court of appeals totally ignored the decisions of this Court.

III. *The Court Of Appeals Misapplied The Decisions Of This Court In Russell And Hampton By Applying Them To The Instant Case Which Has A Totally Different Factual Base Involving No Pre-existing Crime, Criminal Design Or Predisposition And Thus A Different Public Policy Control.*

The decision of the court of appeals is in direct conflict wit' the public policy established by this Court in *Sorrells*, *Sherman*, *Russell* and *Hampton*. This Court established where predisposition existed and where crime existed, as in *Russell*, or the criminal design existed, as in *Hampton*, that the underlying public consideration was the protection of the public from crime as opposed to the police methods employed. In the circumstances where there was no crime or criminal design existing in advance of police activity or police inducement, as was the case in *Sorrells* and *Sherman*, the public was to be protected from what has been historically recognized as dangerous police methods. *Jannotti*, *supra*, at 612-613.

It is this public policy distinction that is the reason for the different result between *Sorrells* and *Sherman* on the one hand and *Russell* and *Hampton* on the other.

This Court in *Russell* said:

> Nor does it seem particularly desirable for the law to grant complete immunity from prosecution to one who himself planned to commit a crime, and then committed it, simply because government undercover agents subjected him to inducements which might have seduced a hypothetical individual who was not so predisposed. *Id.* 434.

The result of this passage is to establish the public policy sequel to *Sorrells* and *Sherman*. In *Russell*, the public need was protection from crime planned and executed by the defendant and the balance of due process tilted in favor of such governmental activity for the protection of the public.

In the instant case, the government urged, and the decision of the appellate court makes it the law, that if the crime is declared difficult to detect, the balance of public need established by this Court is to be ignored. The principle in *Russell* thus is applied to a dissimilar factual situation.

In the instant case, the government did not produce evidence of bad character, as was the case in *Sorrells*, evidence of prior convictions of the same crime, as in *Sherman*, or that another crime or criminal design existed, as in *Russell* and *Hampton*.

The government in the instant case used the most elaborate scheme, designed and "steered" by a professional con man, *United States* v. *Kelly*, 707 F. 2d at 1474 (Ginsburg), and nearly One Hundred Million Dollars in inducements to cause the Petitioner to do an otherwise legal act by promising to perform a routine public service that was available to all of the public on a walk-in basis. (Tr. 2658, 2660, 4120-1). This is the bald "manufacture of crime" or "prosecution for the sake of prosecution,"

United States v. *Kelly*, 539 F. Supp. at 373 and 376 and directly contrary to the public policy control and law established by this Court.

IV. *The Appellate Court Misapplies The Opinions Of This Court And The Public Policy Control Thus Established By Holding That In Order For The Due Process Defense To Apply It Is Required That The Conduct Of The Government Agents Must Include Coercion Or Brutality.*

The decision of the court of appeals, holding that in order for police conduct to be so outrageous that due process principles would bar the government from invoking judicial process to obtain a conviction requires coercion or brutality, is in direct conflict with the opinions of this Court.

The public policy balance required this result in *Russell* for the reasons stated by the Court at 434. For the appellate court to use the passage in *Russell* which cites *Rochin* v. *California*, 342 U.S. 165 (1952) at 431-432, is to distort the opinion and create conflict and injustice by failing to consider the totally different factual setting and public policy control involved. Requiring the existence of coercion is even worse, under the facts of the instant case, than would have been the situation if the due process issue had been raised before this court in *Sorrells* or *Sherman* and the court had held "absent coercion or brutality to the person" we approve or permit such police conduct.

The decisions of this Court clearly do not contemplate the standard created by the court of appeals. Such a standard was not argued by the government below. In *United States* v. *Twigg*, 588 F. 2d 373 (3d Cir. 1978), the Third Circuit following this Court's precedents allowed the due process defense without any coercion or brutality existing.

The analysis of the court of appeals in the present case is clearly faulty and but for this faulty analysis the court of appeals would have affirmed the trial court's dismissal.

V. *The Court Of Appeals Reversed The Law And Public Policy Established By This Court, By Failing To Apply Due Process Principles To The Instant Case Because The Conduct Of The Government Did Not Include Physical Coercion.*

The decision of the appellate court is in conflict with the opinion of this Court in *Sorrells*, *Sherman*, *Russell*, *Hampton* and *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The court of appeals relied on the reference to *Rochin* in *Russell* at 431-432. This Court in *Russell* set forth the reason for a demanding standard under the facts of that case. *Id.* 434. Since this rationale would not apply to the facts in *Sorrells* nor the instant case, the holding would be different under the *Sorrells*' facts and likewise here.

Sherman held that when police officials engaged in the manufacturing of crime, their activity becomes "as objectionable as the coerced confession." *Id.* 371. This Court held in *Miranda* that police tactics used to obtain a confession or statements against the interest of an in custody defendant, constituted psychological coercion. *Id.* 448. The police tactics described in *Miranda* and the tactics of the agents here are remarkably similar; from the isolation of the target one on one to the opening statement of the agent to Kelly, that he assumed that Kelly would take the money when the agent had just been told that Kelly would not take the money, that Kelly had refused it and would do as they asked as a favor, *United States* v. *Kelly*, 539 F. Supp. at 638; and the effort of the officials to minimize the wrongdoing they were inducing by emphasizing the virtue of the Arabs to be given immigration help, picturing the Arabs as political refugees who had done no wrong

and as business people who would invest vast amounts of capital in the United States, and, telling the Petitioner that he did not trust the agents if he did not accept the money and the use of con men could have no purpose but to use psychology and trickery to create the crime.

There can be no doubt regarding the result if the police had used a psychologist or a con man to obtain a confession in *Miranda*. When the factual setting here is all considered in the atmosphere of repeated offers and promises of One Hundred Million Dollars with more to come from the association with the Arabs, psychological coercion clearly and overwhelmingly existed.

Considering this Court held that such police conduct as was shown in *Sorrells*, constituted "a gross abuse of authority." *Id.* 441, it is not reasonable to assume coercion woud have been required by the facts in *Sorrells* or *Sherman* if the due process issue had been raised. Nor should there be such a requirement here. If this be wrong, certainly brutality to the person would not be a requirement. The tactics and the quality of the "stealth and strategy" practiced by the officials in the instant case, that caused this Court to equate the creation of crime by officials with the "coerced confession" was such that the rationale of *Miranda* would prevail and such psychological coercion as existed would support the due process defense.

No authority has been cited by the appellate court or the government where there was no crime or criminal design prior to the government's involvement, similar to the facts in *Sorrells*, or the facts in the instant case where the crime was manufactured by the government, and the defendant was denied relief.

VI. *The Court Of Appeals In Refusing To Remand So As To Ascertain The Scope Of The District Court's Ruling Departed From The Accepted And Usual Course Of Judicial Proceedings.*

The order of the trial court granted *both* the Petitioner's motions to dismiss for due process violations and for judgment of acquittal. App. C. The government in its brief below conceded that it at least appeared that the Petitioner's motion for judgment of acquittal had been granted on the trial court's finding of entrapment as a matter of law.

Despite this the court of appeals held that the trial court had not ruled on the motion for judgment of acquittal as to entrapment as a matter of law. The Petitioner requested that the court of appeals remand to the trial court for a determination of the scope of its ruling. This request was errroneously rejected. If there is some lack of clarity in the actions of the trial court the cause should be remanded. *See, Carter* v. *Stanton*, 405 U.S. 669, 671 (1972).

The face of the trial court's order notwithstanding, the appeals court determined how the trial court ruled even though this was contrary to how even the litigants perceived the ruling.

The necessity to remand to the district court was clearly apparent. To ignore this necessity was to depart from the accepted and usual course of judicial proceedings. The appeals court failed to give the trial court the recognition it and its decision are required to be given. Our judicial system would fall and quickly disintegrate if a reviewing court could ignore the ruling of trial courts or substitute its interpretation of the trial court's ruling for what the record clearly establishes.

VII. *The Appellate Court In Its Opinion Stated It Lacked Guidance To A More Dynamic Definition Of Outrageousness As It Applies To The Instant Facts And Were Therefore "Constrained" To Rule As They Did.*

Perhaps the most compelling reason for granting the writ is the clear request to this Court for "a guide to a more dynamic definition of outrageousness" as it applies to cases where ongoing crime does not exist as in *Russell. United States* v. *Kelly*, 707 F. 2d at 1476 (Ginsburg).

Lacking a better guide, the appellate court felt "constrained" to take the view that *Russell* and *Hampton* have foreclosed the use of a due process defense unless there is coercion and brutality to the person predicated on the authority of *Rochin* as cited in *Russell*. The court of appeals held that this inflexible rule applies even in a case where the crime was created by police action as in *Sorrells* and *Sherman* and the instant case and without regard for the fact that this Court has held that such police conduct is a "gross abuse of authority," *Sorrells* at 441, and as objectionable as the "coerced confession" in *Sherman* at 372.

The appeal court's standard, in fact, erases the due process defense by transforming it into the defense of coercion. This is clearly erroneous.

CONCLUSION

For the reasons set forth in the Petition it is respectfully prayed that a writ of certiorari should issue to the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

No. 82-1660.

**UNITED STATES of America,
Appellant,**

v.

Richard KELLY.

Argued Jan. 11, 1983.

Decided May 10, 1983.

Before ROBINSON, Chief Judge, MacKINNON and GINSBURG, Circuit Judges.

Opinion Per Curiam.

Separate Opinion filed by Circuit Judge MacKINNON.

Separate Opinion filed by Circuit Judge GINSBURG.

PER CURIAM:

Judge MacKinnon files an opinion in Parts I, II, III(A) and IV of which Chief Judge Robinson concurs. Judge Ginsburg files an opinion in which Chief Judge Robinson concurs. Thus Parts I, II, III(A) and IV of Judge MacKinnon's opinion together with Judge Ginsburg's opinion constitute the opinion of the court. The judgment appealed from is reversed, and the case is remanded to the District Court with instructions to reinstate the indictment and the verdict of the jury, and for further proceedings.

MacKINNON, Circuit Judge.

The Federal Bureau of Investigation, in an effort to recover stolen art and securities, set up an undercover operation—"Abscam"—designed to catch red-handed those who dealt in such items. In due time the FBI was led to alter the character of the operation to target some government corruption. There-

after several highly placed local, state and national government officials were indicted and convicted. This appeal involves one United States Congressman.

On January 8, 1980, Congressman Richard Kelly accepted $25,000 from an agent of the FBI who was posing as a representative of two wealthy Arabs as part of the FBI's elaborate Abscam investigation. In return, Kelly agreed to use his position in Congress to assist the Arabs to become permanent residents of the United States. Unbeknownst to Kelly, the FBI recorded the entire illegal transaction on video tape.

On the basis of this and other evidence, Kelly and two other individuals, Eugene Ciuzio and Stanley Weisz, were charged with conspiracy to commit bribery, in violation of 18 U.S.C. § 371 (1976), bribery, in violation of 18 U.S.C. § 201(c) (1976), and interstate travel to commit bribery, in violation of 18 U.S.C. § 1952 (1976). A jury found each defendant guitly on all counts. However, the district court granted Kelly's motion to dismiss the indictment, entering a judgment of acquittal in his favor, because it concluded that the FBI's actions in furtherance of Abscam were so outrageous that prosecution of Kelly was barred by principles of due process. *United States* v. *Kelly*, 539 F.Supp. 363, 370-77 (D.D.C. 1982).[1]

Abscam was indeed an elaborate hoax, created by the FBI with the assistance of a convicted confidence man to ferret out corrupt public officials. Nevertheless, we conclude that the government's conduct in Abscam did not reach that "demonstrable level of outrageousness" which would bar prosecution of the corrupt officials that were uncovered, particularly given the difficulties inherent in their detection. *Hampton* v. *United States*, 425 U.S. 484, 495, n. 7, 96 S.Ct. 1646, 1653 n. 7, 48 L.Ed.2d 113 (1976) (Powell, J., concurring). Accordingly, we reverse the district court and remand with instructions to reinstate the indictment and the jury's verdict.

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[1] The district court granted a new trial to Ciuzio and Weisz. *United States* v. *Kelly*, *supra*, 539 F.Supp. at 377-78. Both were convicted on all counts at their second trial.

I. FACTS

A. *The Abscam Investigation*

In the spring of 1978, the FBI's Long Island office began an undercover investigation with the initial goal of recovering stolen art and securities.[2] The code name for this investigation was "Abscam," a name derived from Abdul Enterprises, the name of a fictitious FBI-created organization which ostensibly represented two Arabs of considerable wealth interested in "investing" in the United States.[3] Convicted confidence man Melvin Weinberg was enlisted by the FBI to assist in the creation and operation of Abscam.[4] Weinberg played the role of financial advisor to Abdul Enterprises, while FBI agents "held" other positions in that organization.[5] Beginning in Janu-

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[2] Trial Transcript (Tr.) at 1442-43, 1559-60, 3361-62, 3552.

[3] Tr. at 3589-91.

[4] From 1968 until 1976, Weinberg had operated an illegitimate business known as London Investors. Weinberg, claiming to represent wealthy investors, promised to arrange loans in exchange for "loan origination fees" *paid in advance*. Tr. at 1554-55, 1665-69. Of course, Weinberg never arranged the loans, but rather absconded with the fees.

Weinberg was arrested by the FBI in 1976 for his London Investors activities and, in 1977, pled guilty to mail and wire fraud charges brought in the United States District Court for the Western District of Pennsylvania. Tr. at 1555, 1669-71. In exchange for his cooperation in four organized crime cases, the FBI interceded on Weinberg's behalf before the district court. As a result, Weinberg was sentenced to three years probation and permitted to return to New York to assist the FBI. Tr. at 1555-57, 1673-74, 3546-51. Thereafter, Weinberg assisted the FBI in Abscam, which was modeled after his successful London Investors scheme. Tr. at 1690-93, 3552, 3589-91. Beginning in August 1978, Weinberg received $1000 per month—raised in 1979 to $3000 per month—for his Abscam work. Tr. at 1028-30, 3546-51.

[5] Tr. at 3374-75.

ary 1979, Anthony Amoroso, a special agent for the FBI, assumed the role of president of Abdul Enterprises.[6]

Initially, the FBI made it known on the streets that Abdul Enterprises had money to invest and waited to be approached with proposals.[7] Abdul Enterprises turned away individuals offering legitimate transactions, but maintained contact with those suggesting illegal activity. In November 1978 Abdul Enterprises was approached by two businessmen, William Rosenberg and William Eden, concerning the possibility of financing certain equipment to be leased to the City of Camden, New Jersey. It appeared that the transaction would require payment of a bribe to Angelo Errichetti, then Mayor of Camden.[8] Thereafter the focus of Abscam shifted to political corruption and organized crime.[9]

On July 26, 1979, Mayor Errichetti, who had since been introduced to the Abscam agents by Eden and Rosenberg,[10] and Howard Criden, a Philadelphia lawyer and associate of Errichetti, met with Weinberg and Amoroso on a yacht in

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[6] Tr. at 1021-22, 3444-45.

[7] Tr. at 1690-92. As Weinberg explained, "we had a big honey pot and all the flies came to it." Tr. at 1691.

[8] Tr. at 1709-14, 3373-78.

[9] Tr. at 1442-43, 3458-59. In December 1979 Mayor Errichetti met with the representatives of Abdul Enterprises and boasted that "he could control" Atlantic City. He later indicated that a bribe of $300,000 to $400,000 would guarantee a gambling license. Tr. at 1715, 3596-98. Errichetti ultimately *led Abscam* to a number of other corrupt public officials. *See United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982); *United States* v. *Jannotti*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982). In March 1979 Abscam uncovered corruption in the Immigration and Naturalization Service. Tr. at 1252-53. *See United States* v. *Alexandro*, 675 F.2d 34 (2d Cir.), *cert denied*, ___ U.S. ___, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982).

[10] Tr. at 1209, 1443-44, 3458-59, 3597-98.

Florida to discuss financing for a proposed casino that a client of Criden wished to build. During the day Amoroso and Errichetti discussed the problems that might face the wealthy Arabs who controlled Abdul Enterprises should an Iranian-type revolution occur in their country and they sought to come to the United States as permanent residents. Amoroso enlisted Errichetti's assistance in obtaining the "cooperation" of public officials and suggested that money would be no problem. Errichetti and Criden agreed and, on August 22, 1979, introduced the Abscam agents to Congressman Michael Meyers, who accepted $50,000 in exchange for his promise to assist the wealthy Arabs.[11] Thus was introduced the "asylum scenario"—whereby members of Congress were paid bribes to ensure that they would introduce private immigration legislation on behalf of the wealthy Arabs if and when necessary—which ultimately caught Kelly.[12]

B. *Abscam's Introduction to Kelly*

On September 10, 1979, Weinberg met with Rosenberg and sought his aid in locating politicians willing to assist his Arab employers to become permanent residents of the United

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[11] *United States* v. *Myers*, 527 F.Supp. 1206, 1210-12 (E.D.N.Y. 1981), *aff'd*, 692 F.2d 823 (2d Cir.1982); Tr. at 1748-51, 3463-68; Due Process Transcript (Due Process Tr.) at 180-83.

[12] There is some dispute as to who created the asylum scenario. The district court concluded that it "was conceived—lock, stock, and barrel—by Weinberg and made its first appearance on July 14, 1979. . . ." *United States* v. *Kelly*, *supra*, 539 F.Supp. at 366 & n. 10. *See* Joint Appendix at 344, 354-67. The government, on the other hand, asserts that Amoroso conceived of the asylum scenario on July 26, 1979, as he cruised by former Nicaraguan dictator Somoza's yacht. Due Process Tr. at 180-81. Insofar as is relevant to this case, the asylum scenario was the suggestion of a government agent—either Amoroso or Weinberg—and not of Kelly.

States.[12] Weinberg outlined the assistance required, indicating that the Arabs would pay $25,000 to a member of the House of Representatives and $50,000 to a member of the Senate for their promise of future assistance. Weinberg suggested that Amoroso would "talk one and one and make the guy safe" at the time of the payoff.[14] In October 1979 Rosenberg related the proposal to a business associate and accountant, Stanley Weisz. Rosenberg told Weisz that the Arabs needed immigration assistance and that Weisz would receive a fee for the proper introductions.[15]

On November 22, 1979, Weisz, while on vacation in Boynton Beach, Florida, met with his longtime business associate, Eugene Ciuzio.[16] During their conversation, Weisz related the Arabs' need for immigration assistance to Ciuzio. Ciuzio replied that he knew a congressman who might be willing to help the Arabs and indicated he would check with him and get back to Weisz.[17] In fact, Ciuzio had never discussed immigration

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[12] Transcript of Meeting of Sept. 10, 1979, at 1-5, 7; Tr. at 890-92, 1088-92, 1443-44, 1565-66, 1570-71, 1740-44. Although Amoroso and Weinberg suggested that Rosenberg "reach out" to politicians as early as August 24, 1979, this was in the context of their request for assistance in obtaining New York gambling licenses. Transcript of Meeting of Aug. 24, 1979, at 7-8; Tr. at 1078-80B. The asylum scenario was not mentioned to Rosenberg at the August meeting.

[14] Transcript of Meeting of Sept. 10, 1979, at 2-3, 7; Tr. at 891-92, 1090-92, 1570-71.

[15] Tr. at 1488-89, 3851-53, 3953-55. Although Rosenberg introduced Weisz to Amoroso and Weinberg at a meeting on September 12, 1979, the asylum scenario was not discussed with Weisz at that time. Tr. at 886-87, 1569-70, 3942-43.

[16] Ciuzio had referred a friend to Weisz for assistance in a federal tax matter. The purpose of the meeting was to provide Weisz with the details of that dispute. Tr. at 3855-63.

[17] Tr. at 1488-89, 3855-63, 3958-60, 4106-07.

matters with Kelly, having first met Kelly on October 1, 1979, in an Orlando restaurant.[18]

Ciuzio promptly arranged to meet with Kelly at the Tampa airport on November 23, 1979. At that meeting Ciuzio told Kelly that he had some Arab clients with immigration difficulties and asked Kelly if he could help them. Kelly indicated that his office handled such matters routinely and that he would be glad to assist the Arabs, particularly since Ciuzio indicated they might invest in his district.[19] Ciuzio informed Kelly that he—Ciuzio—would receive a large fee if Kelly helped the Arabs; Kelly told Ciuzio that the fee would cause no difficulties.[20] Ciuzio promptly called Weisz from the Tampa airport and indicated that Kelly would be happy to help the Arabs.[21]

In mid-December 1979 Weisz informed Rosenberg of Ciuzio's friendship with a Florida congressman who was willing to help the Arabs.[22] On December 16, 1979, Rosenberg called Weinberg and told him that he had a "candidate" who would assist with the Arabs' immigration problems. Rosenberg indicated that the individual was a congressman from Florida, that he wanted $250,000, and that payment would have to be on "an escrow basis." Weinberg suggested that the Congressman be paid $25,000 down, with the balance paid when legislation was required. Rosenberg agreed to set up a meeting with the Congressman at Abdul Enterprises' Wash-

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[18] Tr. at 1995-97, 2022-24, 2610-15, 4099-102.

[19] Tr. at 2656-61, 2844-45, 4109-11, 4198-99. Kelly testified that immigration problems were "handled as a staff matter." Tr. at 2661. Kelly had "no recollection or record that [he] was involved in any [immigration] cases." Tr. at 2660-61.

[20] Tr. at 2844-45, 4109-11, 4198-99. Kelly admitted that he also discussed the amount of his indebtedness with Ciuzio. Tr. at 2844-45.

[21] Tr. at 3866-67, 3958-60, 4113-14.

[22] Tr. at 3869-72.

ington, D.C., townhouse on January 8, 1980.[21] Rosenberg called Weisz and told him of Weinberg's positive response. Weisz gave Rosenberg Ciuzio's telephone number and agreed to call Ciuzio to ask him to contact Weinberg.[24] On December 17, 1979, Rosenberg again called Weinberg and explained that Weinberg would be contacted by "a fellow by the name of Gino [Ciuzio] who will handle all the arrangements for you and who will give you the person."[25]

On December 19, 1979, Amoroso and Weinberg met with Ciuzio in Hollywood, Florida, and explained the assistance that would be expected of the Congressman.[26] *Ciuzio indicated that the individual was Congressman Richard Kelly and intimated that he and Kelly had had previous dealings of a similar nature.*[27] Ciuzio suggested that he told Kelly of the offer and claimed that Kelly left the arrangements to him. Ciuzio opposed direct payment to Kelly and suggested that the money instead be escrowed through Weisz.[28] Amoroso assured him that a private meeting between Amoroso and Kelly would protect the Congressman, and that the wealthy Arabs would invest in Kelly's district to provide an explanation for Kelly's

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[21] Transcript of Telephone Call of Dec. 16, 1979, at 5-9, 12-13.

[24] Tr. at 3869-72.

[25] Transcript of Telephone Call of Dec. 17, 1979, at 1.

[26] Transcript of Meeting of Dec. 19, 1979, at 11-12, 14, 22.

[27] *Id.* at 16, 38-39. Referring to Kelly, Cuizio asserted:

> Not that I'll ever use it on em, of course, but I'm just saying uh umm. *He's in.* Ya know, we were holdin' hands for a long time, now he's pregnant, ya understand. *He's already takin' money* so we're married and thats all.

Id. at 39 (emphasis added).

[28] *Id.* at 16, 18-19, 26, 30, 34-35.

assistance.[29] Weinberg made it clear that the meeting and payment of $25,000 was to assure the Arabs that Kelly

> got the money [and] when we're ready to move that he is gonna be with us.[30]

Ciuzio agreed to "lay out the story" for Kelly.[31]

On December 21, 1979, Ciuzio telephoned Weinberg and suggested a January 8, 1980, meeting with Kelly. Ciuzio reiterated that he and Weisz did not want to have the money handed directly to the Congressman.[32] Weinberg insisted that Kelly be directly involved in the transaction, but indicated that

> [a]ll he [Amoroso] wants the Congressman [to do] is to tell him what he's gonna do for him for the money.[33]

Ciuzio agreed, but requested that they use "the right script, nice and soft."[34]

On December 23, 1979, Ciuzio met Kelly at a restaurant in Alexandria, Virginia, and explained the proposal. *Kelly testified* that Ciuzio told him that

> there were two Arabs that were going to come into the United States and there was concern that they would have an immigration problem, and that if they did, they wanted to be assured that they would have some assistance from a person with some authority and that in this connection, a

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[29] *Id.* at 18-19, 34-35.

[30] *Id.* at 33.

[31] *Id.*

[32] Transcript of Telephone Call of Dec. 21, 1979, at 2-4, 9-10. Earlier, Ciuzio told Weinberg that he asked Kelly to call him from a public phone booth "that would be safe," rather than from his congressional office, to discuss the transaction. Kelly did, in fact, call Ciuzio from a phone booth located a few blocks from his home in Virginia. Transcript of Telephone Call of Dec. 20, 1979, at 2; Tr. at 2685-86, 4265-70.

[33] Transcript of Telephone Call of Dec. 21, 1979, at 13.

[34] *Id.*

representative of these Arabs was prepared to pay a half a million dollars for this assistance. And that the arrangements would be that the two Arabs may not come into the country, but that their representatives wanted to have a meeting.

They wanted to be sure that in the event they needed something, that they would have established a relationship, a contact that would cause this assistance to be available. And in this connection, that they would pay $25,000 just as earnest money . . . *I would receive $25,000 just for going to the meeting*, and nothing would be expected of me, and then if at a later time there developed that there would be some need, then I would be expected to render this assistance and that *I would receive at that time an additional $100,000*, and the rest of the money was to be paid to [Ciuzio, Rosenberg, and Weisz] . . .[45]

Ciuzio also told Kelly of the Arabs' intention of investing substantial sums in the districts of cooperative congressmen.[46]

Kelly agreed to go to the meeting and give his assurances that he would help the Arabs, despite the fact that Ciuzio, Rosenberg, and Weisz would be paid as a result. However, Kelly testified that he refused to accept money for doing so:

I would be glad to do it. But as far as my receiving any money for doing it, I just simply didn't want to do that. There wasn't any need to.

There was no problem. It was a standard procedure and that I would not accept any money . . . I said, . . . I will do that. You can depend on me, I will go to the [h]ouse and we will give these assurances to the representatives. . . .

I am glad to do this as a favor to you. If you want to do something for me . . . I have got some real estate that I want to sell and perhaps you can help me find a buyer for that.[47]

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[45] Tr. at 2663-64 (emphasis added). Ciuzio denied that he told Kelly of the proposal at their meeting, although his testimony was equivocal. Tr. at 4126-31, 4302-05.

[46] Tr. at 2664-65.

[47] Tr. at 2665-66.

C. *Abscam's Payoff to Kelly*

Shortly after 10:00 p.m. on January 8, 1980, Kelly, Ciuzio, Rosenberg, and Weisz arrived at Abdul Enterprises' Washington, D.C., townhouse to meet with Weinberg and Amoroso. Initially Weinberg met with Ciuzio, who vigorously sought to disuade Amoroso from attempting to bribe Kelly directly.[*] The two ultimately agreed that Kelly would acknowledge that the money was in exchange for his agreement to assist the Arabs, but that Ciuzio would actually take the money from the meeting:

> WEINBERG: You can be in with him, all right?
>
> CIUZIO: Well I think I should be here to, ahh steer the f____ing thing . . .
>
> WEINBERG: Let him, let, just put the money on the table and say here, take it . . . here, Congressman, here's the twenty-five thousand and that's it, you pick it up.
>
> CIUZIO: Go along with that, he knows the answers too.
>
> WEINBERG: All right, so . . .
>
> CIUZIO: I rehearsed with him.[*]

After this conversation Kelly and Amoroso met privately. Amoroso explained the Arabs' immigration difficulties and

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[*] Transcript of Meeting of Jan. 8, 1980, at 1-11. Ciuzio said, "Don't hand him no f____ing money, don't talk money, tell him what the problem is. . . ." *Id.* at 3. Later Ciuzio and Weinberg had the following exchange:

> WEINBERG: Well, he knows he's getting money right?
>
> CIUZIO: He ain't taking no f____ing money in his hand.
>
> WEINBERG: All right, youl'll take it.
>
> CIUZIO: All right.
>
> WEINBERG: he'll hand it to you.

Id. at 4.

[*] *Id.* at 10.

their willingness to pay to have "friends" in Congress when required. He also indicated that the Arabs would invest in their "friends' " districts in order to protect them from pressure.[40] Kelly's response revealed that he was aware of the purpose for the investments.

> AMOROSO: Now I realize that ahh there's a possibility that ahh if, if you were to introduce something like this, that ahh, people would ask, well why is he doing it, ya known, well what's the reason, now . . .
>
> KELLY: I've got the reason.
>
> AMOROSO: OK, what . . . would that be . . . investing?
>
> KELLY: Sure.[41]

Kelly agreed to assist the Arabs, and, as recorded on the video tape, indicated that Amoroso's arrangement with Ciuzio was fine:

> All of this stuff that you've been talking about . . . *I don't know anything about that, I'm not involved with it* . . . Gino and these guys are my friend[s] . . . what you said makes a lot of sense to me . . . I'm gonna stick with ya . . . *and you can put me out there on the hill, and when you come back in the morning, I'll still be there* . . . So this . . . will be helpful to me and . . . maybe . . . down the road sometime, you can do me a favor. *But in the meantime, whatever these guys are doing is all right, but I got no part in that* . . . In other words, . . . your arrangement with these people is . . . all fine. . . . [Y]ou have my assurance that what you have told me here, sounds like a good thing and . . . I will . . . stick by these people.[42]

After Amoroso received a call from Assistant United States Attorney Jacobs who was monitoring the meeting and who thought Kelly was being "cute," and after Kelly conferred with

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[40] *Id.* at 11-13.

[41] *Id.* at 12-13.

[42] *Id.* at 16 (emphasis added).

Ciuzio,[43] Amoroso sought to clarify Kelly's position. Kelly made it clear that he wanted the money given to Ciuzio:

> KELLY: [Y]ou and I gotta . . . learn to talk to each other.
>
> AMOROSO: Well I know . . .
>
> KELLY: [D]on't stumble around, jump in there . . .
>
> AMOROSO: Jump in there and give it to you?
>
> KELLY: Sure.
>
> AMOROSO: Ok. I was under the impression . . . when this thing was set up . . . that I was gonna give you something . . . tonight . . .
>
> KELLY: Yeah.
>
> AMOROSO: Ok, and that the rest was gonna come . . .
>
> KELLY: Yeah.
>
> AMOROSO: when you introduce that.
>
> KELLY: That's right.
>
> AMOROSO: Ok, is that, is that still . . .
>
> KELLY: Yeah. Here's . . . what the thing is. U'mm ahh just simply deal with Gino [Ciuzio] about it.
>
> AMOROSO: Ok. You want me to give him the money . . . here?
>
> KELLY: Sure.[44]

However, when Amoroso indicated that all of the money was intended to go to Kelly, and that Ciuzio would be separately compensated, Kelly was confused:

> I understood that what you were talking about was . . . all there was as far as Tony [sic, should be Ciuzio] was concerned and so as far as I'm concerned, he takes that . . . [B]ut I see I didn't know . . . about this other arrangement. . . . It's . . . all right but I didn't know about that. So lets talk about it some.[45]

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[43] Tr. at 1104-09, 1173-76, 1181-82, 1392-93, 1412-14, 2207-08, 2870-72, 4145-47.

[44] Transcript of Meeting of Jan. 8, 1980, at 22-23.

[45] *Id.* at 24-26.

Amoroso explained that he thought that giving the money directly to Kelly would avoid witnesses, thus protecting him. Kelly agreed:

> AMOROSO: I thought that the best way of doing it was . . . a one on one between you and I. Now to me that sounds like . . . if you're looking for security . . . the best way of doing it.
>
> KELLY: I think so too.[46]

Amoroso then gave Kelly $25,000 in cash and Kelly stuffed the money into the pockets of his suit.[47]

II. THE DISTRICT COURT DECISION

In ruling on Kelly's motion to dismiss the indictment and to set aside the verdict of the jury, the district court acknowledged the need for undercover investigative technique to detect "diabolical criminal conduct so sophisticated as to be nearly impossible to detect," but concluded that

> as Abscam affected Kelly, it was not the type of carefully devised and supervised covert operation generally accepted by the courts. In many respects it differed sharply from traditionally accepted types of operations.

United States v. *Kelly*, *supra*, 539 F.Supp. at 371. The district court complained that the asylum scenario was not triggered by any suspicion of corruption in government and that, unlike ordinary, passive sting operations, it utilized legal and illegal bait promoted by a "recruiting agent" "to persuade the Congressman to become a sting patron." *Id.* The district court concluded that the sole purpose of the asylum scenario was to test the virtue of members of Congress. *Id.* at 373.

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[46] *Id.* at 26-27.

[47] *Id.* at 28-30.

The district court admitted its personal distaste for the concept of law enforcement agencies testing the virtue of congressmen, but held, assuming that such activities were proper,

> the application of the testing procedures in this case patently exceeds the outer limits of any concept of fundamental fairness.
>
> The litmus test—or temptation—should be one which the individual is likely to encounter in the ordinary course. To offer any other type of temptation does not serve the function of preventing crime by apprehending those who, when faced with actual opportunity, would become criminals. Instead, it creates a whole new type of crime that would not exist but for the government's actions.
>
> When improper proposals are rejected in these virtue-testing ventures, the guinea pig should be left alone. *In ordinary real life situations, anyone who would seek to corrupt a Congressman would certainly not continue to press in the face of a rejection for fear of being reported and arrested.* The FBI of course had no such restraints in this case.

Id. at 373-74 (emphasis added) (footnote omitted).

The district court found that Kelly rejected the bribe offer at his meeting with Ciuzio on December 23, that Ciuzio informed the Abscam agents of that fact at the townhouse on January 8, and that Kelly initially rejected the bribe in his meeting with Amoroso. *Id.* at 374. Accordingly, the district court concluded

> that in the circumstances of this case, any further pursuit and pressure on the part of government agents was nothing short of outrageous. . . . If the government had no knowledge of Kelly doing anything wrong up to his rejection of illicit money, its continuing role as the third man in a fight between his conscience and temptation rises above the level of mere offensiveness to that of being "outrageous." *No concept of fundamental fairness can accomodate what happened to Kelly in this case.*

Id. at 376 (emphasis added).

III. ANALYSIS

A. *The Due Process Defense*

The district court concluded that the FBI's conduct in furtherance of Abscam was so outrageous that prosecution of Kelly was barred by principles of due process.[*] The Supreme Court has recognized that there may be situations

> in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely

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[*] Kelly contends that the district court also held that he was entrapped as a matter of law. Brief for Appellee at 74-78. Although the district court did submit Kelly's entrapment defense to the jury, Tr. at 4929-34, we do not interpret Judge Bryant's decision to hold that Kelly was entrapped as a matter of law. Rather, our review of the record reveals that the district court in fact thought that Kelly had not aggressively pursued his claim of entrapment. Tr. at 3294-95, 4417; Due Process Tr. at 70-71, 216. Judge Bryant recognized that it would be difficult for a public official such as Kelly to pursue an entrapment defense:

> I know its tough for a man to come in and say, "Well, I got into a situation and I was overborne with temptation and I succumbed." I know it's tough for him to say that. This man is in public life and that kind of thing.

Tr. at 3295. *See also United States* v. *Kelly*, *supra*, 539 F.Supp. at 377 n. 58. Furthermore, the mere fact that a judgment of acquittal was entered in Kelly's favor does not indicate that the district court ruled Kelly was entrapped as a matter of law. Kelly's own request for a judgment of acquittal on due process grounds belies any such assertion. Tr. at 1855A-55F; Due Process Tr. at 74. Accordingly, there is no need to address Kelly's contention that the double jeopardy clause of the Fifth Amendment prohibits the government's appeal of the post-verdict, judgment of acquittal in this case. *See generally United States* v. *DiFrancesco*, 449 U.S. 117, 130, 101 S.Ct. 426, 433, 66 L.Ed.2d 328 (1980); *United States* v. *Singleton*, 702 F.2d 1159 at 1161-1162 (D.C.Cir.1983).

> bar the government from invoking judicial processes to obtain a conviction . . . .

United States v. *Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-1643, 36 L.Ed.2d 366 (1973).[49] More recently, a divided Court reaffirmed that due process principles might foreclose prosecution of a predisposed defendant if the government was excessively involved in his criminal activity. *Hampton* v. *United States*, *supra*, 425 U.S. at 495, 497, 96 S.Ct. at 1652, 1653 (Powell, J., concurring) (Brennan, J., dissenting). However, Justice Powell, in his critical concurring opinion, stated:

> I emphasize that the cases, *if any*, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a *demonstrable level of outrageousness* before it could bar conviction. *This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover Government involvement* . . . . [Law] [e]nforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity.

Id. at 495, n. 7, 96 S.Ct. at 1653 n. 7 (Powell, J., concurring) (emphasis added).

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[49] The Court cited *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), apparently as an example of the type of outrageous government activity which would bar prosecution under principles of due process. In that case, the Court found that actions of police officers, who broke into the bedroom of the defendant, attempted to pull drug capsules from his throat, and, finally, forcibly pumped his stomach to retrieve the capsules, violated due process. *Id.* at 166, 172, 72 S.Ct. at 206, 209. The Second Circuit has read this citation to indicate that due process will bar a prosecution only if the government's conduct directly invades some personal right of the defendant. *United States* v. *Alexandro*, 675 F.2d 34, 40 (2d Cir), *cert. denied*, ___ U.S. ___, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982); *Archer* v. *Commissioner of Corrections*, 646 F.2d 44, 46-47 (2d Cir.), *cert. denied*, 454 U.S. 851, 102 S.Ct. 291, 70 L.Ed.2d 141 (1981).

Our task in this case, therefore, is to assess whether the FBI's conduct in Abscam reached a "demonstrable level of outrageousness," while keeping in mind the difficulties inherent in detecting corrupt public officials. *Id.*; *United States* v. *Russell*, *supra*, 411 U.S. at 432, 93 S.Ct. at 1643. Measured against this standard, the FBI's conduct did not violate due process.

B. *Abscam*

Abscam was indeed an elaborate hoax, involving a fictitious, FBI-created corporation purportedly representing Arabs of enormous wealth, as well as the limousines, yachts, and lavishly appointed residences necessary to make the hoax believable. Yet stripped of these trappings of wealth, Abscam was no more than an "opportunity for the commission of crime by those willing to do so." *United States* v. *Myers*, 692 F.2d 823, 837 (2d Cir.1982). Amoroso and Weinberg let it be known that they would pay substantial sums of money to congressmen willing to promise to assist the wealthy Arabs with their immigration difficulties. Thereafter, the FBI operatives simply waited for the grapevine to work and to see who appeared to take bribes. No congressmen were targeted for investigation; rather, Abscam pursued all who were brought to the operation by the grapevine.[20] In essence, then, Abscam was *not* significantly different from an undercover drug or fencing operation

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[20] Tr. at 1096-98, 1237-39, 1255-57, 3656-58, 3726-28. However, not all officials brought to Abscam were offered bribes. The Abscam operatives recognized that they had no control over the representations made by intermediaries such as Ciuzio, Rosenberg, and Weisz. Tr. at 1237-39, 3656-58. Accordingly, the FBI *always* discussed the asylum scenario with the officials prior to the offer of a bribe. Tr. at 3726-28. That was certainly the case with Kelly; Amoroso carefully discussed the details of the asylum scenario with Kelly *before* any bribe money was paid. *See* discussion at 28 *infra*. In one instance, where his discussion revealed that the official was unaware of the corrupt nature of the proposal, the FBI terminated the meeting. Tr. at 1422-25, 3288-91.

offering to buy from all who appear at its door.[31] Instead of buying stolen goods or contraband drugs, Abscam bought cor-

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[31] The district court concluded that Abscam was unlike ordinary, "passive" undercover operations because it used "recruiting agents" to spread the word that bribes were available. *United States* v. *Kelly*, *supra*, 539 F.Supp. at 371. I disagree. I seriously doubt that the government would establish an undercover drug or fencing operation without spreading the word, through informants and criminal elements (labeled "recruiting agents" by the district), that its services were available. The Abscam investigators did no more.

My colleagues term Abscam an extraordinary operation. *Infra*, at 1474-1476. It was extraordinary only in the positions of some of the individuals involved and in the intangible nature of the "commodity" purchased. Otherwise, it is strikingly similar to ordinary undercover operations. To conclude otherwise suggests a lack of familiarity with changes in the law enforcement activities of the FBI since the death of J. Edgar Hoover in 1972. *Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice*, S. Rep. No. 682, 97th Cong., 2d Sess. 39 (1982). Hoover was an advocate of keeping FBI activities "of an open character not in any manner subject to criticism." *Id.* at 35. He resisted efforts to get the FBI into drug enforcement because it would have required that FBI agents become involved in "unsavory" undercover operations, but was forced by presidential directive to allow undercover FBI activities in defense intelligence matters during World War II. *Id.* at 36-37. Following Hoover's death his successor, Clarence M. Kelly, with the support of Congress, and pursuant to widespread public demand, began to move the FBI into "big cases" involving *white-collar* and organized crime. *Id.* at 40-41.

Initially, the FBI, in cooperation with local law enforcement authorities, established undercover fencing operations, gaining valuable experience in undercover techniques "that avoided claims of entrapment." *Id.* at 40. Thereafter, the FBI's undercover activities have expanded to include "investigations of white-collar crimes, political corruption, personal and property crimes, and racketeering crimes." *Id.* at 43. The FBI now also has responsibility to investigate violations of the criminal drug laws of the United States. 28 C.F.R. § 0.85(a) (1982). Unfortunately, the government cannot select the nature of the crimes that will be committed and the detection of many

rupt official influence in Congress. Such government involvement in crime does not violate principles of due process.

We need not determine the exact limits on government involvement in crime imposed by the due process clause for it is

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of these "big" crimes require highly sophisticated undercover operations. Congressional appropriations for such undercover activity have increased substantially, from $1 million for 53 operations in 1977 to $4.5 million for 463 operations in 1981. *Id.* at 42. Thus, although large FBI undercover operations might once have been characterized as extraordinary, such operations are now clearly part of the FBI's routine activities and their legality is not destroyed by their imaginative character.

My colleagues also criticize the failure of the FBI to closely supervise the Abscam operation. *Infra*, at 1474-1475. To the extent that this criticism extends to the non-FBI middlemen, such as Ciuzio, Rosenberg and Weisz, involved in Abscam, their activities could hardly be "supervised" because they did not know Abscam was an undercover investigation. The FBI took considerable precautions to compensate for its inability to control the representations of the middlemen. *See* note 50 *supra*.

Finally, my colleagues appear to criticize the amount of money and other benefits offered by Abscam to Kelly. *Infra*, at 1477. In my view the sums offered were not unreasonable or "outrageous," particularly if it is remembered that Abscam was dealing with corruption of high government officials and historically in such cases substantial payments are made. Examples are legion: *United States* v. *Jannotti*, 673 F.2d 578, 598-99 (3d Cir.) (en banc), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982) (bribery of member of Philadelphia City Council; payments in range of $10,000 to $30,000 not excessive); *United States* v. *Manton*, 107 F.2d 834, 840-44 (2d Cir. 1938), *cert. denied*, 309 U.S. 664, 60 S.Ct. 590, 84 L.Ed. 1012 (1940) (bribery of circuit judge of United States Court of Appeals for the Second Circuit; payment in Depression dollars totaling over $188,000; payments ranged from $11,500 to $60,000); *Fall* v. *United States*, 49 F.2d 506, 512 (D.C.Cir.), *cert. denied*, 283 U.S. 867, 51 S.Ct. 657, 75 L.Ed. 1471 (1931) (Tea Pot Dome scandal; bribery of cabinet officer; payments of large amounts of government bonds and "loan" of $100,000, worth at least $1 million today); *United States* v.

clear that the FBI's involvement in Abscam was less than that government involvement found unobjectionable by the Supreme Court.[32] In *Hampton*, the defendant asserted that a government informant suggested the defendant could make money by selling drugs, supplied the defendant with drugs, and provided the purchasers—who were also government agents—of those drugs. *Hampton* v. *United States*, *supra*, 425 U.S. at 486-87, 96 S.Ct. at 1648. Justice Brennan characterized the government's activity as "doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary." *Id.* at 498, 96 S.Ct. at 1654 (Brennan, J., dissenting). Similarly, in *Russell*, a government agent provided the defendant with a scarce chemical essential for the unlawful manufacture of methamphetamine, and purchased the illicit product. *United States* v. *Russell*, *supra*, 411 U.S. at 424, 93 S.Ct. at 1639.

In each of these cases the government not only provided an *opportunity* to commit a crime, but also provided the *means* to commit that crime. Nevertheless, in each case the Supreme Court concluded that the government's conduct did not violate

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Williams, No. 81 CR 269 (N.D.Ill. May 1981) (conspiracy to bribe United States Senator from Nevada; offered Las Vegas property valued at approximately $1.6 million at $200,000 discount; *see* N.Y. Times, Oct. 22, 1982, at A18, col. 1). Many other cases could be cited but no more are necessary to establish that the sums offered Kelly were not "in excess of real-world opportunities" even though that is not the test. *Infra*, at 1477. Had they been Kelly would have become suspicious and would have shied away. That the bait was taken here is the best evidence that it was within the "real world" of the Congressman, i.e., that his "price" was estimated correctly.

[32] For this reason, we need not decide the validity of the due process test formulated by the district court—whether the temptation offered is "one which the individual is likely to encounter in the ordinary course." *United States* v. *Kelly*, *supra*, 539 F.Supp. at 374. It is suggested, however, that criminal conduct being as highly varied as it is that such test is unduly speculative.

due process. *Hampton* v. *United States*, *supra*, 425 U.S. at 485, 490-91, 96 S.Ct. at 1648, 1650; *id.* at 491-92, 96 S.Ct. at 1650-1651 (Powell, J., concurring); *United States* v. *Russell*, *supra*, 411 U.S. at 424-25, 93 S.Ct. at 1639. Where, as in Abscam, the government simply provides the opportunity to commit a crime, prosecution of a defendant does not violate principles of due process. This conclusion is in accord with decisions of the Second and Third Circuits upholding Abscam convictions challenged on due process grounds. *United States* v. *Williams*, 705 F.2d 603 (2d Cir.1983); *United States* v. *Myers*, 692 F.2d 823 (2d Cir.1982); *United States* v. *Alexandro*, 675 F.2d 34 (2d Cir.), *cert. denied*, ___ U.S. ___, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982); *United States* v. *Jannotti*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982).[34]

C. *Specific Claims*

1. *Reasonable Suspicion*

Nor do any of the specifically challenged FBI actions in furtherance of Abscam reach that "demonstrable level of outrageousness" which would bar Kelly's prosecution. The district court stressed that Abscam's asylum scenario was not triggered by any suspicion of corruption in government. *United States* v. *Kelly*, *supra*, 539 F.Supp. at 371. Yet prior to setting the asylum scenario in motion, Abscam had uncovered evidence of official corruption in New Jersey[35] and in the Immigration and Naturalization Service.[36] Prior to enlisting

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[34] The Third Circuit's decision in *Jannotti* is particularly significant because it held that *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), the only post-*Hampton* case to uphold a due process challenge to prosecution because of excessive government involvement, did not control its consideration of Abscam. *United States* v. *Jannotti*, *supra*, 673 F.2d at 608-10 & n. 17. Thus Kelly's reliance on *Twigg* is misplaced.

[35] *See* note 9 *supra*.

[36] *United States* v. *Alexandro*, *supra*, 675 F.2d at 36-38.

Rosenberg's aid in the asylum scenario, the Abscam operatives had seen at least one congressman accept a bribe for immigration assistance. *United States* v. *Myers*, *supra*, 692 F.2d at 830-31. Finally, prior to the January 8 meeting with Kelly, the Abscam operatives had evidence from which they could conclude that Kelly was, in fact, corrupt. Ciuzio stated as much in his meeting with Amoroso and Weinberg on December 19.[36] Furthermore, *Ciuzio told Weinberg on December 20 that he asked Kelly to call him from a "safe" phone booth to discuss the transaction; that Kelly did so was strong evidence for the Abscam operatives that Kelly was fully aware that he was participating in an illicit transaction.*[37] Thus, the FBI had ample suspicion of corruption to justify pursuing the asylum scenario and Kelly, if such suspicion was necessary.[38] In assert-

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[36] *See* note 27 *supra*. Contrary to the statements of my colleagues and the district court, not all of Ciuzio's statements regarding Kelly were clearly false. *See infra*. at 1474-1475 n. 1; *United States* v. *Kelly*, *supra*, 539 F.Supp. at 367. Ciuzio told the Abscam agents that Kelly needed the bribe money "to straighten his whole life out" because he had used "a little f____ing money he ain't supposed to use. . . ." Transcript of Meeting of Dec. 19, 1979, at 17. Kelly admitted that he had discussed the amount of his indebtedness with Ciuzio at their meeting at the Tampa Airport on November 23, although he offered no explanation why he discussed his personal finances with a man he was meeting for only the third time. *See* note 20 *supra*. This conversation provides evidence that Ciuzio spoke truthfully when he told the Abscam agents that Kelly intended to use the money from the illicit transaction to pay his debts.

[37] *See* note 32 *supra*. *Kelly admitted* calling Ciuzio from a public phone booth at Ciuzio's request. Tr. at 2685-86.

[38] Although we need not decide the question, both the Second and Third Circuits have rejected the argument that the government must have reasonable suspicion of wrongdoing before proceeding with an undercover operation such as Abscam. *United States* v. *Jannotti*, *supra*, 673 F.2d at 608-09; *United States* v. *Myers*, 635 F.2d 932, 941 (2d Cir), *cert. denied*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980).

ing the contrary, my colleagues, without explanation, fail to give a common sense interpretation to the uncontradicted evidence in the record. *See* Sep. Op., *infra*, at 1 n. 1. Members of the federal judiciary have no power to veto law enforcement practices merely because such practices offend their personal tastes. *Cf. Hampton* v. *United States*, *supra*, 425 U.S. at 490, 96 S.Ct. at 1650 (entrapment); *United States* v. *Russell*, *supra*, 411 U.S. at 435, 93 S.Ct. at 1644 (same).

2. *Utilization Of Weinberg*

It is submitted that Kelly's argument that the FBI violated due process by utilizing the services of an admitted confidence man, Melvin Weinberg, in Abscam should likewise be rejected. Successful creation of an "elaborate hoax" such as Abscam may well *require* employment of "experts" such as Weinberg to give the operation an aura of "credibility" and "contracts" with criminal elements. The employment of a convicted confidence man in Abscam is analogous to the entirely proper employment of a convicted seller of drugs to purchase drugs from a suspected distributor. As the Second Circuit stated:

> [U]se of dishonest and deceitful informants like Weinberg creates risks to which the attention of juries must be forcefully called, but the Due Process Clause does not forbid their employment, detail their supervision, nor specify their compensation.

United States v. *Myers*, *supra*, 692 F.2d at 846. In this case, Weinberg's checkered background and dubious credibility were brought before the jury through vigorous cross-examination. The jury was entitled to consider Weinberg's testimony and give it such weight as it found appropriate. In my view there was no error of constitutional dimension in the FBI's use of Weinberg's services in Abscam.

3. *Failure To Memorialize Conversations*

Similarly, Kelly's claim that the FBI violated due process by failing to record or memorialize every conversation between Weinberg and Kelly's codefendants is without merit. At trial,

only *Weisz* seriously challenged Weinberg's version of an unrecorded conversation—a five minute telephone conversation with Weisz on December 21, 1979.[59] Kelly had the benefit of Weisz' "exculpatory" version of this conversation at trial[60] and has failed to explain how any of the other unrecorded conversations would have added anything of significance to his defense. The FBI operatives successfully recorded the vast majority of their communications with Kelly and his codefendants, including all but one of their critical conversations.[61] The FBI's occasional failure to record Abscam conversations does not constitute a due process violation.[62]

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[59] Tr. at 3791-94, 3798-802, 3810-11. There was apparently only one other significant unrecorded conversation between Weinberg and Kelly's codefendants—an eleven minute telephone conversation between Weinberg and Ciuzio on December 18, 1979. Tr. at 1276-77, 1282-84, 1615-18. Amoroso testified that he did not prepare a memorandum on that conversation because their meeting with Ciuzio the following day allowed him to bring out everything discussed in that conversation. Tr. at 1276-77. *See* Tr. at 1053-54, 1058.

[60] Tr. at 3857-77.

[61] I suspect that Kelly is more upset with Abscam's considerable success in *recording* conversations than with its occasional failures in that regard.

[62] *See United States* v. *Myers*, *supra*, 692 F.2d at 846.

Kelly's reliance on a line of cases requiring government *preservation and production at trial of notes and tapes created during an investigation* is inapposite. *See United States* v. *Bundy*, 472 F.2d 1266 (D.C.Cir.1972) (per curiam); *United States* v. *Bryant*, 439 F.2d 642 (D.C.Cir. 1971). In those cases we dealt with

> the legal consequences of *intentional non-preservation by investigative officials if highly relevant evidence*, colored by clear reluctance even to admit that the evidence ever existed at all.

United States v. *Bryant*, *supra*, 439 F.2d at 647 (emphasis added). We have subsequently held that the government is not required to preserve or produce insignificant or irrelevant evidence. *United States* v. *Bowles*, 488 F.2d 1307, 1313 (D.C.Cir. 1973), *cert. denied*, 415 U.S. 991, 94 S.Ct. 1591, 39 L.Ed.2d 888 (1974). Kelly does not

4. Multiple Bribe Offers

Finally, Kelly contends that the FBI operatives violated due process when they persisted in offering a bribe after what he characterizes as his initial rejection. Kelly asserts that he rejected the bribe at his meeting with Ciuzio on December 23, that Ciuzio informed Amoroso and Weinberg of that fact at the townhouse on January 8, and that he rejected the bribe several times in his meeting with Amoroso. Kelly argues, and the district court agreed, that under these circumstances Amoroso's several bribe offers to Kelly were outrageous and violated due process. *United States* v. *Kelly*, *supra*, 539 F.Supp. at 374-76. I cannot agree.

The evidence in this case clearly demonstrates that at no time did Kelly reject Abscam's corrupt immigration proposal. On both December 23 and January 8, Kelly agreed to assure the wealthy Arabs that he would help them with their immigration problems as a favor to Ciuzio, despite the fact that Kelly knew that in return the Arabs would pay substantial sums to Ciuzio, Rosenberg, and Weisz.[63] It is also clear that Kelly understood that part of the arrangement was that the Arabs would make substantial investments in his district.[64] Such agreements, which would benefit Kelly indirectly, constitute violations of the bribery statute.[65] Furthermore, the discussions between Ciuzio, Kelly, and the Abscam operatives at the townhouse of January 8 focused on the *manner* in which

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assert that the Abscam operatives deliberately destroyed recordings of the conversations at issue; he merely claims that Weinberg failed to record them. Nothing in the *Bryant* line of cases suggest that the government is required to *create* documentary evidence of all conversations.

[63] Transcript of Meeting of Jan. 8, 1980, at 16; Tr. at 2661-66, 2848-57.

[64] Transcript of Meeting of Jan. 8, 1980, at 12-13, Tr. at 2664-65.

[65] *See* 18 U.S.C. § 201(c) (1976). The district court so instructed the jury. Tr. at 4920.

the bribe would be paid, not on whether it would be paid. Ciuzio told Weinberg not to bribe Kelly directly, but agreed that he would take the money for Kelly.[56] After agreeing that Amoroso was going to give him some money at the meeting, Kelly asked Amoroso to pay the bribe to Ciuzio—to "deal with [Ciuzio] about it."[57] In my view, Congressman Kelly "did not reject a bribe, he [initially] rejected its payment under circumstances he feared would be incriminating." *United States* v. *Myers*, *supra*, 692 F.2d at 838.[58]

I likewise reject Kelly's characterization of his conversation with Amoroso on January 8 as a *series* of bribe offers. Although the terms of the corrupt Abscam proposal were mentioned several times during that converstion, Amoroso's discussion reflects the evasive and circumspect negotiation to be expected of a person seeking to corrupt a public official. In my view, Amoroso's conversation with Kelly on January 8 can be fairly characterized only as a *single offer* of a corrupt proposal to Kelly.[59] For these reasons I reject kelly's contention that he

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[56] Transcript of Meeting of Jan. 8, 1980, at 1-11. *See* notes 38-39 and accompanying text *supra*.

[57] Transcript of Meeting of Jan. 8, 1980, at 22-23. *See* text accompanying note 44 *supra*.

[58] In *Myers*, the Second Circuit considered the appeal of Congressman Frank Thompson, who first met Amoroso and Weinberg on the morning of October 9, 1979. At that meeting Thompson rejected Amoroso's offer of money and left. After further discussions with an intermediary, Howard Criden, Thompson again met with Amoroso, agreed to assist the wealthy Arabs, and asked Criden to "look after" the $50,000 offered by Amoroso. Criden carried the money from the meeting. *United States* v. *Myers*, *supra*, 692 F.2d at 832-33. On these facts, which in many respects are more favorable to a due process defense than those in Kelly's case, the Second Circuit rejected Thompson's claim that the FBI violated due process by offering a bribe after his initial rejection of the bribe at the first meeting. *Id.* at 838.

[59] *See* Tr. at 1125-31, 1178-79.

intially rejected a bribe, that the Abscam agents persisted in offering him a bribe, and that they thus violated due process.

IV. CONCLUSION

Like the district court,

> we like to think, and we hope, that our Congressmen and Senators, and indeed all public servants, are strong enough to withstand any imaginable pressure and reject any type of temptation no matter how attractive, and walk away. . . . But in reality, *the hard fact is that our public servants* are not recruited from the seminaries and monasteries across the land and that they *are plagued by the frailties of human nature.*

United States v. *Kelly*, *supra*, 539 F.Supp. at 375 (emphasis added). Because of this fact and because dishonest public officials, responsive more to money than to their obligations to the nation, may cause grave harm to our society, we recognize the need for law enforcement efforts to detect official corruption. Furthermore, such corruption is "that type of elusive, difficult to detect, covert crime which may justify Government infiltration and undercover activities." *United States* v. *Alexandro*, *supra*, 672 F.2d at 42 (footnote omitted).[70]

The Supreme Court has made it clear that "a successful due process defense must be predicated on *intolerable government conduct* which goes beyond that necessary to sustain an entrapment defense." *United States* v. *Jannotti*, *supra*, 673 F.2d at 607 (emphasis added). Considering the genuine need to detect corrupt public officials, as well as the difficulties inherent in doing so, we conclude that the FBI's conduct in furtherance of its Abscam operation, insofar as it involved Kelly, simply did not reach intolerable levels. Accordingly,

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[70] *Accord Baucom* v. *Martin*, 677 F.2d 1346, 1350-51 (11th Cir.1982); *United States* v. *Jannotti*, *supra*, 673 F.2d at 609. *See Hampton* v. *United States*, *supra*, 425 U.S. at 495 n. 7, 96 S.Ct. at 1653 n. 7 (Powell, J., concurring); *United States* v. *Russell*, *supra*, 411 U.S. at 432, 93 S.Ct. at 1643.

having carefully considered all of Kelly's claims that the government's conduct violated due process, we reverse the district court's dismissal of the indictment, as well as its entry of the judgment of acquittal, and direct the district court to reinstate the indictment and the verdict of the jury.

Judgment accordingly.

GINSBURG, Circuit Judge:

"Abscam," as the District Court's thoughtful opinion details, was an extraordinary operation. The investigation was steered in large part by a convicted swindler; it relied upon con men to identify and attract targets, to whom legitimate as well as illegitimate inducements were offered; it proceeded without close supervision by responsible officials.[1] The District Court allowed the jury to determine whether defendant Kelly was "predisposed" to commit the crime charged, and therefore not

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[1] *See United States* v. *Kelly*, 539, F.Supp. 363, 366-67, 367 n. 16 and accompanying text, 374 n. 48 and accompanying text (D.D.C.1982).

We do not share Judge MacKinnon's view that, apart from "trappings of wealth," Abscam "was *not* significantly different from" run-of-the-mine "passive" undercover operations. *See* Judge MacKinnon's opinion, *supra* at p. 1469-1470 & note 51. As the District Court's opinion sets out in painstaking detail, the Abscam actors did a good deal more than simply "spread the word." Nor can we agree with Judge MacKinnon that the FBI "had ample suspicion of corruption to justify pursuing . . . Kelly." *Id.* at p. 1471. That suspicion, as Judge MacKinnon recites, was based on Ciuzio's report to Amoroso and Weinberg that "Kelly was, in fact, corrupt." *Id.* at p. 1471. But as the District Court observed:

> Ciuzio went to great lengths to make it appear that he had virtual control over the Congressman, indicating at the time that Kelly was dishonest and was already taking money and had various other weaknesses. He indicated that he had known and cultivated Kelly for about 2½ years. None of this was true. No attempt was made to verify it; and there is no indication that Weinberg and Amoroso believed it.

539 F.Supp. at 367 (footnotes omitted).

"entrapped" under the current definition of that defense.[2] After the jury returned a guilty verdict, however, the District Court dismissed the indictment against Kelly on the ground that the government's conduct of the investigation was fundamentally unfair, and therefore incompatible with due process.[3] The sole issue properly before us for review is the correctness of the due process ruling.[4]

The District Court stated and attempted to apply an objective test to determine when government investigation exceeds tolerable limits: Was the crime-inducing conduct in which the government engaged, the temptation presented to the target, modeled on reality?[5] This test, the District Court indicated,

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[2] In contrast to an "objective" test that measures the methods used to induce the criminal act against standards of acceptable police behavior, the current, "subjective" test of entrapment looks to the propensity or "predisposition" of the induced defendant to engage in the proscribed conduct. *See United States* v. *Jannotti*, 673 F.2d 578, 598-98 (3d Cir.) (en banc) (summarizing Supreme Court precendent), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982); *United States* v. *Myers*, 692 F.2d 823, 835-36 (2d Cir.1982).

[3] In so ruling, the District Judge did not purport to determine whether the government produced sufficient evidence to warrant a jury finding that Kelly was "predisposed" to receive a bribe. Rather, his analysis centered on the nature of the government's overtures. 539 F.Supp. at 376-77. *Cf. United States* v. *Jannotti*, *supra*, 673 F.2d at 607-08 (lower courts must resist permitting objective test of entrapment, rejected by the Supreme Court, to reemerge as a due process defense; entrapment defense reflects Court's view of legislative intent and Congress may reshape the defense as it sees fit).

[4] As the District Judge recognized, "there is a tendency for the due process defense to overlap with the entrapment defense." 539 F.Supp. at 376 (footnote omitted). However, on this appeal pursued by the government, only the due process defense is properly presented.

[5] As the District Court phrased it: "The litmus test—or temptation—should be one which the individual is likely to encounter in the ordinary course." 539 F.Supp. at 374 (footnote ommitted).

should apply when the government had no knowledge of prior wrongdoing by the target and no reason to believe the target was about to commit a crime;[6] it would serve as a check against government creation (rather than apprehension) of criminals by offers or importuning that would never occur in the real world.[7]

The real-world test, as applied by the District Court, is speculative. The District Judge assumed that a person who offers a bribe would retreat upon encountering an initial rejection and would not "have the audacity" to press on "for fear of being reported."[8] But the first overture renders the party offering the bribe vulnerable to prosecution. "In for a calf," such a person might press on if he perceives any chance of ultimate success.[9] Nonetheless, were the slate clean, we might

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[6] *See id.* at 371 (Abscam was launched without "even the remotest suspicion about the existence [in general or with respect to any particular individual] of any prior, on-going, or imminent criminal activity"); *id.* at 373 (Department of Justice and FBI had "not even a scent of suspicion of criminal conduct, past, present, or imminent . . . by Kelly").

[7] The District Court noted that, immediately after Abscam became public, the Assistant Attorney General, Criminal Division, testified in congressional hearings that modeling the transaction after reality serves as a "guarantee of fairness" to the individual "because it means that anybody who is brought in, is brought in with the same type of temptation[] that we know is floating out there." *Id.* at 374 n. 47, citing *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 154 (1980).

[8] 539 F.Supp. at 374, 376, 377. As the District Judge finally phrased his application of the real-world test: "If after an illegal offer is made, the subject rejects it in any fashion, the government cannot press on." *Id.* at 377.

[9] As the government points out, Brief for Appellant at 68, parties to real-world transactions could readily adjust to a one-refusal rule: the bribe taker would always resist the first overture.

be attracted to an approach similar to the District Court's, and would perhaps ask whether, in real-world circumstances, the person snared would ever encounter bait as alluring as the offer the government tendered.[10]

However, our slate contains references that lower courts are not positioned to erase. We may not alter the contours of the entrapment defense under a due process cloak,[11] and we lack authority, where no *specific* constitutional right of the defendant has been violated, to dismiss indictments as an exercise of supervisory power over the conduct of federal law enforcement agents. *See United States* v. *Payner*, 447 U.S. 727, 737 n.

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[10] The inquiry might extend to the nature of the reward and quid pro quo authorized by responsible officials of the Department of Justice and the FBI, the efforts made to assure that those who carried out the scam adhered to the approved script, and the nature of the transaction in fact proposed to the target. The tolerable limit would be crossed if the opportunity offered differed qualitatively from, and therefore was more difficult to resist than, those the target would otherwise encounter. *See* Spera, *Protecting the "Otherwise Innocent": An Alternate Standard for Entrapment* (Draft, 1982).

Exchanges such as this one between an FBI agent and Ciuzio, the unwitting middle-man who conveyed the FBI's offer to Kelly, would invite particular scrutiny:

[Ciuzio] Now, you you're saying ya gonna give em twenty-five thousand

[FBI Agent] Right

[Ciuzio] For doin nothin

[FBI Agent] For doin nothin

[Ciuzio] To stand by

[FBI Agent] To stand by. And if the guy comes, when the guy comes . . .

Transcript of 12:13 p.m. meeting, Dec. 19, 1979, at 29.

[11] *See United States* v. *Twigg*, 588 F.2d 373, 382 (3d Cir.1978) (Adams, J., dissenting).

9, 100 S.Ct. 2439, 2447 n. 9, 65 L.Ed.2d 468 (1980).[12] Precedent dictates that we refrain from applying the general due process constraint to bar a conviction except in the rare instance of "[p]olice overinvolvement in crime" that reaches "a demonstrable level of outrageousness." *Hampton* v. *United States*, 425 U.S. 484, 495 & n. 7, 96 S.Ct. 1646, 1653 & n. 7, 48 L.Ed.2d 113 (1976) (Powell, J., concurring) (cases, "if any," in which a "predisposed" defendant can successfully invoke a due process defense "will be rare"); *United States* v. *Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-1643, 36 L.Ed.2d 366 (1973).

The requisite level of outrgeousness, the Supreme Court has indicated, is not established merely upon a showing of obnoxious behavior or even flagrant misconduct on the part of the police; the broad "fundamental fairness" guarnatee, it appears from High Court decisions, is not transgressed absent "coercion, violence or brutality to the person." *See Irvine* v. *California*, 347 U.S. 128, 132-33, 74 S.Ct. 381, 382-383, 98 L.Ed. 561 (1954) (distinguishing *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)). Without further Supreme Court elaboration, we have no guide to a more dynamic definition of the outrageousness concept, and no warrant, as lower court judges, to devise such a definition in advance of any signal to do so from higher authority.[13]

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[12] *See also United States* v. *Caceres*, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979) (noncompliance with internal departmental guidelines is insufficient cause for excluding evidence).

[13] Lower courts have generally read Supreme Court precedent to confine the broad due process check on the conduct of law enforcement officers to the slim category of cases in which the police have been brutal, employing against the defendant physicial or psychological coercion that "shocks the conscience." *See, e.g., United States* v. *Alexandro*, 675 F.2d 34, 40 (2d Cir.), *cert. denied*, ___ U.S. ___, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982) (attempted bribery of immigration official) ("The distinction between the ["shocking"] cases and the instant one is clear. There, the challenged conduct ranged from an invasion into the integrity of the body to an extraordinarily coercive interrogation. The activities called into question here, however,

The importuning of Congressman Kelly and the offers made to him, extraordinary and in excess of real-world opportunities as they appear to have been, did not involve the infliction of

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merely involve special investigative techniques for obtaining evidence of Alexandro's voluntary participation and do not entail bodily invasion."); *Yanez* v. *Romero*, 619 F.2d 851, 855 (10th Cir.), *cert. denied*, 449 U.S. 876, 101 S.Ct. 221, 66 L.Ed.2d 98 (1980) (threat to use a catheter to take urine sample from recalitrant prisoner not shocking) ("It was very likely the lack of force and brutality was instrumental in the Court's ruling [in *Schmerber* v. *California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)]."); *United States* v. *Ford*, 553 F.2d 146, 155 n. 34 (D.C.Cir.1977) ("The *Irvine* case did not fall within the exclusionary rule of *Rochin* . . . because there had been no coercion, violence, or brutality to the person.") (dictum); *United States* v. *VanMaanen*, 547 F.2d 50 (8th Cir. 1976) (not shocking that police prepared false reports, advised witness to leave town, failed to disclose before trail existence of informant); *United States* v. *Gengler*, 510 F.2d 62 (2d Cir.) (kidnapping of defendant from Bolivia and transportation to the United States not shocking), *cert. denied*, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975); *United States* v. *Harrison*, 432 F.2d 1328 (D.C.Cir. 1970) (grabbing throat to prevent swallowing of heroin capsules not shocking because calculated to prevent destruction of evidence); *Rivas* v. *United States*, 368 F.2d 703, 710-11 (9th Cir. 1966) (body cavity border search) ("This is *not* a *Rochin* case, with its physical assault on a defendant, both before the stomach pumping, and at the time of its occurrence. It was the *physical assault* in *Rochin* which caused reversal. . . ."), *cert denied*, 386 U.S. 945, 87 S.Ct. 980, 17 L.Ed.2d 875 (1967); *Blefare* v. *United States*, 362 F.2d 870 (9th Cir. 1966) (in connection with border search, rectal examination, administering an emetic, stomach pumping, largely without objection by defendant, not shocking); *United States* v. *Baskes*, 442 F.Supp. 322, 333 (N.D.Ill.1977) ("In *Irvine* itself, the Supreme Court apparently limited application of the supervisory powers doctrine to cases which involved 'coercion, violence or brutality to the person.' ") (dictum), *aff'd*, 649 F.2d 471 (7th Cir. 1980).

Contrast Hall v. *Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (corporal punishment of students might violate due process if it "amounted to a brutal and inhumane abuse of official power, literally shocking to

pain or physical or psychological coercion. We are therefore constrained to reverse, although we share the District Court's grave concern that the Abscam drama, both in its general tenor, and in "the [particular] manner in which Kelly was handled," 539 F.Supp. at 373, unfolded as "an unwholesome spectacle."

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the conscience"); *Huguez* v. *United States*, 406 F.2d 366, 379 (9th Cir. 1969) (warrantless border search of rectal cavity without clear prior indication it contained narcotics shocking (dictum)

But see United States v. *Valencia*, 541 F.2d 618, 621-22 (6th Cir. 1976) (violation of attorney-client privilege of codefendant may be grounds for dismissing charges).

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Criminal Action No. 80-00340
No. 82-1660

UNITED STATES OF AMERICA

Appellant

v.

RICHARD KELLY

BEFORE: Robinson, Chief Judge, Ginsburg, Circuit Judge, and MacKinnon, Senior Circuit Judge

ORDER

On consideration of the Petition for Rehearing of Appellee, filed June 13, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

FOR THE COURT:

George A. Fisher
GEORGE A. FISHER
Clerk

BY: Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cr. No. 80-00340

UNITED STATES OF AMERICA

Plaintiff,

v.

RICHARD KELLY, EUGENE ROBERT CIUZIO, a/k/a/ GINO CIUZIO, and STANLEY WEISZ,

Defendants.

FILED
MAY 13 1982
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

For the reasons stated in the accompanying memorandum, it is hereby

ORDERED that defendant Kelly's motion for judgment of acquittal and to dismiss the indictment against him is granted, and it is

FURTHER ORDERED that judgment of acquittal is granted and the indictment against defendant Kelly is dismissed, and it is

FURTHER ORDERED that the judgments against defendants Ciuzio and Weisz are vacated and a new trial is granted as to them, and it is

FURTHER ORDERED that the motion to reopen is denied.

William B. Bryant
UNITED STATES DISTRICT JUDGE

Date: May 13, 1988

APPENDIX D

United States District Court,
District of Columbia.

No. Cr. 80-00340.

UNITED STATES of America, *Plaintiff*,

v.

Richard KELLY, Eugene Robert Ciuzio, a/k/a/ Gino Ciuzio, and Stanley Weisz, *Defendants*.

May 13, 1982

MEMORANDUM ON DUE PROCESS AND OTHER POST TRIAL MOTIONS

BRYANT, Senior District Judge.

Former Congressman Richard Kelly was found guilty of bribery, 18 U.S.C. § 201(c), conspiracy, 18 U.S.C. § 371, and violation of the Travel Act, 18 U.S.C. § 1952. Eugene Ciuzio and Stanley Weisz were found guilty of conspiracy, aiding and abetting, 18 U.S.C. § 2, and violating the Travel Act. All three defendants have *made motions to dismiss their indictments* because the government violated due process, *for judgments of acquittal*, and *for a new trial*. Ciuzio has also moved for a severance and a new trial. *For the reasons that follow, the court is dismissing the indictment against Kelly and granting new trials to Ciuzio and Weisz.*[1]

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[1] The government has submitted, in its brief of October 30, 1981 at n.2, that the relevant evidence for the due process issues includes the entire record in this case as well as in the other Abscam cases. The defendants have cited evidence from other cases in their briefs. The court agrees that any evidence of government conduct which affected the defendants in this case is relevant, and has therefore considered that evidence as reflected in the transcripts and exhibits from the other due process deliberations.

I.

"Abscam" is a code word used by the Federal Bureau of Investigation (FBI) to identify an undercover operation which was originally intended to uncover securities fraud and recover stolen art treasures, and ended up with FBI agents and a master criminal posing as representatives of Arab sheiks attempting to persuade Congressmen to take bribes in front of hidden video cameras. The Second Circuit characterized this latter phrase as a plan of the Executive Branch of the government of the United States "to determine whether members of the Legislative Branch and others would commit bribery offenses if presented with the opportunity to do so."[2] In another Second Circuit case, Judge Kaufman observed that "Abscam indeed was an intricate artifice, a stratagem of convoluted ploys and schemes designed to test the faith of those in the high echelons of government who are the repositories of the public trust."[3] In yet another related case, the Third Circuit pointed out that "the basic plan evolved into [the] various subparts, each with its own cast of participants which were ultimately the subject of [prosecution]," and emphasized that it was focusing on the particular facts material to the case which it had under consideration.[4] Abscam has also been referred to by the government from time to time as a "sting operation." I suppose, in a general sense, all these descriptions apply. However, in order to make the reasons for the disposition of this case very clear, a little more detailed treatment of this final phase of Abscam and the precise manner in which it related to Kelly is necessary.

In 1977, FBI agents prevailed upon a federal judge to allow a swindler and con man to remain free on probation after conviction for mail fraud in exchange for a promise to cooperate with the Bureau in some of its endeavors against organized crime.[5]

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[2] *United States* v. *Myers*, 635 F.2d 932, 934 (2d Cir. 1980).

[3] *United States* v. *Alexandro*, 675 F.2d 34 at 43 (2d Cir. 1982).

[4] *United States* v. *Jannotti*, 673 F.2d 578 at 581 (3rd Cir. 1981).

This convict, Melvin Weinberg, stated flatly this his motivation to work for the FBI was "that I could make some big money."[6] Shortly after the FBI intervention, Weinberg was hired on a monthly basis to be a principal participant in the earlier phase of Abscam, i.e., the securities and art aspects. In January 1979, shortly after Agent Amoroso took over as Weinberg's immediate supervisor, Amoroso recommended that Weinberg's pay be raised from $1,000 per month plus expenses to $3,000 per month plus expenses because, among other reasons, Amoroso was concerned that Weinberg would "try and con other people on the side" if his living habits were not kept up.[7] This regular income was supplemented by substantial bonuses from time to time. Meanwhile, the field agents and Weinberg were maintained on a living standard consistent with great wealth.[8] Not long thereafter some white collar crime was uncovered in the Immigration and Naturalization Service.[9]

The record reflects that the last of the various "subparts" or "convoluted ploys," which ultimately resulted in the indictment of several Congressmen, was conceived—lock, stock, and barrel—by Weinberg and made its first appearance on July 14, 1979 in a conversation with George Katz, a defendant

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[5] Tr. at 1553-60. "Tr." refers to the trial transcript in this case. References to transcripts or exhibits of other proceedings are preceded by the name of the case from which the transcript or exhibit comes. *See* note 1.

[6] Tr. at 1557.

[7] Tr. at 1027-30.

[8] Tr. at 1358. *See also, United Staes* v. *Jannotti*, 501 F.Supp. 1182, 1193-94 (E.D.Pa. 1980).

[9] *Alexandro.*

in another case.[10] Up until the time that the tape of this conversation was reviewed sometime within the following two weeks, apparently nobody in the FBI had entertained the notion of testing the virtue of legislators with the investment/immigration problem scenario.

This scenario was indeed "an intricate artifice." As Weinberg told Katz, the Arab sheiks, who had been investing in the

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[10] *Myers* due process exhibit 58 at 11-24, is a transcript of a conversation on July 14, 1979 between Weinberg and Katz.

The evolution of the public explanations for the origin of the asylum scenario itself raises interesting questions which need not be answered here.

Weinberg first testified about the origin of the asylum scenario in the *Jannotti* due process hearings before Judge Fullam in Philadelphia. There, he said that the idea first occurred to him while on a yacht on July 26 as a result of a suggestion by Criden. *Jannotti* due process at 3.86-3.87. Amoroso testified at the same hearing that *he* thought of the scenario the day before they were on the yacht as a result of a July 25 newspaper article about former Nicaraguan dictator Somoza's immigration problems. *Id.* at 5.148-49. In the Brooklyn due process hearings, Amoroso repeated the newspaper article story. *Myers* due process at 4107. However, he later admitted that his review, prior to the July 26th meeting, of the Weinberg-Katz tape, where the entire scenario was discussed, might have had "some bearing in [his] mind" when he suggested the asylum scenario on July 26. *Id.* at 4109.

The government's assertion in oral argument, *Kelly* due process at 180-83, that the genesis was prompted by an ad lib by Amoroso on July 26 and that the idea was merely passed along by Weinberg and Amoroso after being "originated by Errichetti, Criden and Congressman Myers," *id.* at 182, is not in accordance with the record. And neither is the government's latest representation to the effect that "Abscam was not the creation of Weinberg" if the term Abscam is meant to refer to the asylum scenario. There is no evidence of the originator of the initial Abscam concept—the securities and art recovery project—but the record is absolutely clear that the final phase which was directed at Members of Congress was Weinberg's brainchild.

United States, were afraid that there would come a time when they would have to flee their country because of internal problems, as did the Shah of Iran. To insure against any problems they may have with immigrating to the United States, Weinberg said the sheiks wanted to "sign up" as many Congressmen and other public officials as possible.[11] The Congressmen's commitment would be secured with promises of investment in their districts and payments of cash to them.

Apparently the FBI quickly approved the new phase of the operation, and Weinberg used his connections with other con men and criminals to spread the word that $25,000 would be paid to Congressmen and $50,000 would be paid to U.S. Senators for their help.[12] More money would be paid when the sheiks actually got into this country.[13] This money was in addition to the millions of dollars of legitimate investments which would be directed to the districts of helpful Congressmen.

The anticipated effect of this offer was that persons would be encouraged to bring the offer of investments and cash to the attention of Congressmen in the hope of getting a piece of the action. Weinberg characterized his announcement as "setting out a honey pot" and then just sitting back and waiting. As was to be expected, Weinberg's proposition activated some hustlers and con men with varying degrees of expertise who were anxious to cash in. Inasmuch as the contacts between the middlemen and the Congressmen were not monitored, the Bureau had no first-hand knowledge of whether both the legal and illegal aspects of the deal were presented to the Congressmen, and what the responses were.

The scheme affected Kelly in the following fashion. William Rosenberg, goaded on by Weinberg and Amoroso with promises of millions of dollars for various chores undertaken on

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[11] *Myers* due process exhibit 58 at 11-24.

[12] Tr. at 1090-91.

[13] *Id.*

behalf of the enterprise,[14] passed the word to, among others, Stanley Weisz. Sometime later, Weisz mentioned the general proposition to Gino Ciuzio who had become acquainted with Congressmen Kelly in the fall of 1979.

After a series of phone calls, Rosenberg and Weisz put Ciuzio in contact with Weinberg and a meeting was arranged for Ciuzio, Weinberg, and Agent Amoroso (who used the alias Tony DeVito). At this meeting, on December 19, 1979, Ciuzio went to great lengths to make it appear that he had virtual control over the Congressman, indicating at the time that Kelly was dishonest and was already taking money and had various other weaknesses. He indicated that he had known and cultivated Kelly for about 2½ years.[15] None of this was true. No attempt was made to verify it;[16] and there is no indication that Weinberg and Amoroso believed it.

This meeting amounted to a briefing for Ciuzio, who wanted to know the details of Weinberg's proposition. Ciuzio was filled in by Amoroso and Weinberg and instructed as to how to make his pitch to Kelly. Indeed, at one point during this briefing, Ciuzio said: "Whatever program you feed into me, I'll give it to him."[17] The program, of course, included the very attractive investment in the Congressman's district on the one hand, along with the proposal to buy his assistance in any immigration problem. Also during this briefing, Ciuzio sought to convince Weinberg and Amoroso that if they would just give him

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[14] Tr. at 1073. Rosenberg has pled guilty in this case to conspiracy to bribe and defraud the United States.

[15] Government exhibit 1(b) and (c) at 15-39.

[16] Tr. at 4123-24, 1115-16. FBI Director Webster has testifed that since the middlemen do not know they are dealing with the FBI and are not monitored or controlled, "[w]e must, therefore, carefully evaluate any information they provide us as to the willingness of a third party to engage in a crime before we proceed further, and assume that if such a third party does meet with us, he is aware of the criminal nature of the meeting." *Myers* due process exhibit 110 at 24.

[17] Government exhibit 1(b) and (c) at 30.

the money they would have nothing to worry about—"I'll take a bag of money and we are through with the whole thing."[18] The money, by the way, was no longer $25,000, but had been raised by Ciuzio to $250,000, or as he put it, "a quarter mill." To this proposition Weinberg quickly said: "That's agreeable."[19] Obviously, Weinberg was authorized to dangle any amount of money before the middlemen in order to accomplish their purpose.

Ciuzio then went to Kelly and apparently fed him the program he had been given. At the trial of the case, the uncontradicted testimony of both Kelly and Ciuzio was that when Ciuzio told Kelly that money was available for him, Kelly rejected the idea of a pay-off, but at the same time expressed interest in the legitimate bait, that is, the enormous investments which were proposed for his district.[20] Thus, the only evidence presented at trial shows that when the bribe was first offered to Kelly, by Ciuzio, it was rejected.

Finally, a meeting was set up for January 8, 1980 at the FBI's townhouse in Washington at which Kelly was to meet the representatives of the Arab sheiks. Soon after arrival at the townhouse Ciuzio, in a one-on-one confrontation with Weinberg, made a frantic and what appears to be desperate argument against offering Kelly any money. Unbeknownst to Ciuzio, this encounter was videotaped. In an unrecorded meeting between Ciuzio and Amoroso in a hallway, a similar conversation occurred. During the Ciuzio-Weinberg encounter, Ciuzio immediately told Weinberg that Kelly had indicated to

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[18] *Id.* at 19. Ciuzio sought to convince Weinberg and Amoroso that he had such control over the Congressman that it was unnecessary for them to deal with Kelly and that Ciuzio himself would guarantee that what they wanted would in fact be done. Weinberg and Amoroso insisted on some contact with the Congressman and began to tell Ciuzio how to make his pitch.

[19] *Id.* at 17.

[20] Tr. at 2663-66, 2851-57, 3046-48.

him that he would not take any payoff for what he would do for the sheiks.[21] Later, the conversation went as follows:

Ciuzio: Now, here's what I'm telling ya.

He's a kid and I know he's ripe for the first big . . . score. This a Congressman, ya understand? This ain't a . . . hustler, cause we're hustlers. We're wise guys . . . shake hands . . . budabomb . . . budabomb . . . buda . . . It don't mean nothin, ya know what I'm saying? Don't hand him no . . . money, don't talk money, tell him what the problem is, how could ya help, he'll explain it . . .

Weinberg: I don't know, ya gotta speak to him. That may be a problem, Gino. Why don't you . . .

Ciuzio: Listen, let me tell ya what you're buying here, ok. You know this. Cause maybe this is his first shot in this role, all right? He ain't buying no . . . Congressman. He's buying the vehicle to accomplish your package, ya follow? He ain't s. . . let me tell ya somethin . . .

Weinberg: Sit down a second and we can talk.

Ciuzio: Now let me explain it ta ya this way. Now that we're here, see, cause I make . . . things happen. With a little miscommunication with the other two guys and you, you get nervous ya know, makin' a big deal. It's a big deal if it goes wrong.

Weinberg: Yeah, but you . . . we gotta make sure . . .

Ciuzio: You can't usurp the guy's position.

Weinberg: Ok, but you understand . . .

Ciuzio: He just left, ya understand? . . .

Weinberg: we're talking . . . all right, we're talking about if he trusts you . . .

Ciuzio: Who? The Congressman? . . .

Weinberg: . . . and if you if he trusts you, right? . . .

Ciuzio: Yeah.

Weinberg: Let Tony hand you the money in front of him. Long as we know he's getting money . . .

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[21] Government exhibit 2(b) and (c) at 1.

Ciuzio: That's ok. But don't say hey, Congressman . . . ya know what I mean? Ya can't make him a . . . hood, ya know.

Weinberg: No, but he's gotta know that he's getting paid to do it, ya know the . . .

Ciuzio: Maybe, he's got the answer . . .

Weinberg: But the guy ain't lilly white, ya know. God forbid he backs out.

Ciuzio: Listen, listen to me . . .

Weinberg: . . . if somethin goes wrong, it's our jobs . . .

Ciuzio: Listen to me, do you trust, ahh Bill?

Weinberg: Yeah.

Ciuzio: I mean he talks good about you.

Weinberg: Hey . . .

Ciuzio: All right. If you don't feel that way about him, ya know, what . . . wha . . . I know ya gotta little problem here with Tony. Because if you say suppositions . . . there the . . . guy, one time, the guy came . . . This is the Congressman, I brought . . . pictures in the newspaper to prove it to ya. This is the guy. I gave it to Bill, show it to Mel, I show it to Tony . . .

Weinberg: Well, he knows he's getting money right?

Ciuzio: He ain't taking no . . . money in his hand.

Weinberg: All right, you'll take it . . .

Ciuzio: All right . . .

Weinberg: . . . he'll hand it to you.

Ciuzio: . . . and I want to tell you another thing . . .

Weinberg: Yeah.

Ciuzio: . . . and nobody out there's getting no . . . money. I'll have no response to the money. If, if nottin happens here, if you give us the money, he don't do it, I'll give you the . . . money back.

Weinberg: Well, that ain't the idea. The problem ya know, Gino let me tell you . . .

Ciuzio: Ya know this has, like, been a one-way deal.

Weinberg: We we look, we don't mind paying the money. But we gotta problem that we go to Yassir and we say ta him, we laid it out, he said did you give it to the Congressman, we don't care the first twenty-five goes to him, the rest I told ya, I'll deliver to you.

Ciuzio: I told ya before on the phone, because it's hard on the phone, ya know what I mean? I can't tell you . . . you're gonna get killed by a . . . car tomorrow.

Weinberg: Yeah but you don't

Ciuzio: We understand that

Weinberg: . . . we're not, Tony'll tell him that we're not asking for a guarantee.

Ciuzio: I don't wanna have to give the guy a . . . bribe. That's what I'm telling ya.

Weinberg: Well . . .

Ciuzio: It ain't necessary, ya know what I mean?

[Tony DeVito (in another room): How bout some ahh, do we have any club soda?]

Weinberg: But the idea . . .

Cuizio: I don't like to talk ta him like that. I talk ta him in a different way.

Weinberg: It's not that, hey . . . we believe . . .

Ciuzio: Here's the kind of guy that says listen now, hey if it helps you, God bless you. I don't want nothing, I owe you one, and he goes, listen if you could find a buyer for my real estate . . .

Weinberg: But this is a different . . . but this is a different story Bill told us, now wait a second, let me tell ya . . .

Ciuzio: I don't know what Bill told ya.

Weinberg: I'm talking . . . and Weisz.

Ciuzio: We went through this once before you and I . . .

Weinberg: Weisz said to me, the way we laid it out, the guy was coming here and we were to tell him that it's a hundred thousand for him . . .

Ciuzio: No sir, no . . . way you gonna tell him that . . .[2]

. . . .

Weinberg: No no, I laid the whole thing out with him . . .

Ciuzio: . . . Because he was putting stipulations . . .

Weinberg: I laid . . .

Ciuzio: about the money . . .

Weinberg: Well maybe he has stipulations . . .

Ciuzio: . . . the escrow, front money now, and . . . this and that guarantee.

Weinberg: No no, he no no. The problem was, here's the deal I made with him. Twenty-five now to him and he says it goes one on one in the room. I says good enough, one on one. I will not be there, it'll be just Tony . . .

Ciuzio: I'll tell you what his answer will be . . .

Weinberg: Wait, wait let me finish . . .

Ciuzio: . . . he's gonna have ta talk to him.

Weinberg: Wait, second thing was that the balance of the money, when we call up within a week or two, ta go, I would deliver him the balance when I say go, anywhere he wants in a suitcase, all right, the other two hundred and twenty-five thousand, and that's it and then we don't even . . . want to see you . . .

Ciuzio: Who you gonna deliver it to?

Weinberg: It's to Weisz.

Ciuzio: Ohh, that's all right with me, I don't give a . . .

Weinberg: All right? And there was no, I don't ever want to see the Congressman no more. All we want to know is the guy is working for us, he's gonna do our bidding and that's all we want to know.

Ciuzio: went through all this. . . . If he's here, I've told him the whole . . . thing. Know what his answer was to me?

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[2] *Id.* at 2-6.

> Weinberg: . . . what?
>
> Ciuzio: Naah, I owe ya one. But you know I've got two pieces of property in ahh . . . St. Petersburg. Yeah it's sold. That's the way he talks.
>
> Weinberg: See we can . . . we can't, we look . . . let me explain. We can't pay a quarter of a million dollars and the guy is gonna say he owes ya one . . .
>
> Ciuzio: Let me tell ya somethin, I'm gonna tell . . . I'm gonna punch a hole right in your logic . . . You're gonna make a . . . hoodlum outta him for twenty-five thousand. You're gonna try . . .[23]

Although we do not have a recording of the conversation, the testimony shows that during the Ciuzio-Amoroso meeting, Ciuzio also tried to impress Amoroso with the fact that no money should be offered to the Congressman.[24]

Finally, the Congressman met with Amoroso alone. Soon after sitting down in the privacy of a separate room, Amoroso proposed a payment of money to Kelly. The Congressman told him that he was interested in the investment in his district but that whatever arrangements Amoroso had about paying money for his help with immigration, he had "no part in that."[25] Amoroso was not deterred. He intimated that the large investments could very well be made somewhere else in the country and brought up the illegal payments again. Again the Congressman told him that he was there to talk to him about the investments in his district and tried to keep the conversation on that subject. At the trial, Amoroso explained his tenacity: "Well, because I wasn't clear in my mind as to what the Congressman was really thinking about or what he was sure of. Until I could clear it up in my own mind, I did not want to give him any money."[26] When it appeared that Amoroso was not

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[23] *Id.* at 8-9.

[24] Tr. at 1139-40, 1171-72, 1175.

[25] Government exhibit 2(b) and (c) at 16-17.

[26] Tr. at 1178.

making headway on the bribery offer to the Congressman, a government attorney, John Jacobs, who was stationed in a basement room set up to monitor the happenings upstairs called up from downstairs to Amoroso.[27] Although the house was wired and set up with cameras and recording equipment, no record of the conversation was made. What transpired on that telephone and the purpose of the call were the subject of the most vague recollection, but it was ultimately conceded by both parties that Jacobs told Amoroso that Kelly was "being cute."[28] Amoroso stated that he received no instructions from Jacobs, although Jacobs was monitoring meeting for the purpose of giving advice. At any rate, after the telephone call Amoroso persisted with Kelly and not too long thereafter, when $25,000 was displayed to him spread out in packets of $100 bills, Kelly accepted it as the initial payment of a $100,000 bribe.[29]

II.

Up to now, courts have been unambiguous in recognizing the function of law enforcement as preventing and detecting crime and apprehending criminals.[30] There is also general acceptance of the proposition that in order to fulfill these traditional functions, it might become necessary to resort to those techniques which frequently give rise to the claim of entrapment, i.e., artifice, deceit, and stratagem.[31] I fully appreciate the need for and the value of aggressive, resourceful, and innovative law enforcement in our modern society which far too often is beset

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[27] Government exhibit 2(b) and (c) at 18; Tr. at 1178-80.

[28] Tr. at 1181, 1392.

[29] Government exhibit 2(b) and (c) at 28.

[30] *United States* v. *Russell*, 411 U.S. 423, 434, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973); *Sherman* v. *United States*, 356 U.S. 369, 372, 78 S.Ct. 819, 820, 2 L.Ed.2d 848 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 441-42, 53 S.Ct. 210, 212, 77 L.Ed. 413 (1932).

[31] *Russell*, 411 U.S. at 434, 93 S.Ct. at 1644; *Sherman*, 356 U.S. at 372, 78 S.Ct. at 820; *Sorrells*, 287 U.S. at 441, 53 S.Ct. at 212.

with diabolical criminal conduct so sophisticated as to be nearly impossible to detect. I agree with Judge Kaufman that, "carefully devised and supervised covert investigations often are the only means of discovering breaches of the fundamental mandate of one's office."[32]

However, as Abscam affected Kelly, it was not the type of carefully devised and supervised covert operation generally accepted by the courts. In many respects it differed sharply from traditionally accepted types of operations.

I know of no reported case where at least some inkling of corruption was not the forerunner of undercover activity in a bribery prosecution. When Weinberg first passed the word that money would be paid to a Congressman for immigration help and that large amounts of money were available for investment, no one in the government had even the remotest suspicion about the existence of any prior, on-going, or imminent criminal activity of this type either as to its existence in general or the participation of any individual.[33] In other words, there was nothing to trigger traditional law enforcement activities until the government made its overtures through those who were attracted to the honey pot and thus became middlemen.

The government, for obvious reasons, vehemently seeks to disclaim any government involvement beyond Weinberg and to disown Rosenberg, Weisz, and Ciuzio as its agents. But this position is patently untenable in the face of the evidence.[34] It is obvious that although Rosenberg, Weisz, and Ciuzio were unaware of it, they were programmed to one end, i.e., to bring in some Congressman, and in this case it was Kelly, for the

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[32] *Alexandro*, at 43.

[33] Tr. at 1352-56.

[34] *Sherman*, 356 U.S. at 374-75, 78 S.Ct. at 821-22; *Johnson* v. *United States*, 317 F.2d 127, 128 (D.C.Cir.1963).

purpose of accepting a bribe. Amoroso admitted this on cross examination:

> Q: So on December 19, 1979, you were offering a bribe to Congressman Kelly?
>
> A: Through Mr. Ciuzio, yes.[45]

Thus, as it affected Kelly, Abscam, was not a traditional sting operation. It had a feature unknown to any sting operation that I know of. This consisted of a recruiting agent who was programmed to go out and use a formula supplied by the point man of the operation, which included a strong legitimate attraction. This formula containing legal and illegal bait was used to persuade the Congressman to become a sting patron.

The ordinary sting, on the other hand, is nothing more than a passive operation which serves as an attraction for those who become criminals under their own power, certainly with no help from anyone connected with the sting. This difference can be illustrated as follows. Persons who patronize a "fence" operation set up by police are thieves who have already committed crimes when they contact the sting. In another standard motif, police officers disguise themselves as elderly persons sitting in a park which has been plagued by robberies and muggings and, while under proper surveillance by cooperating officers, wait to be victimized by whoever gets the notion to rob them. In neither instance do we have officers, or persons programmed by them, canvassing the neighborhood with legitimate incentives designed to encourage apparently innocent persons to take advantage of the sting operation.

The unique nature of Abscam was not lost on some of the participants. Robert C. Stewart, the Attorney in Charge of the Newark Strike Force, wrote that there is a fundamental difference between the subject matter of a conventional "sting" operation and that of the present operation. In the former, the subject matter under discussion (such as a stolen television set in the hands of a junkie thief) is contraband per se and any

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[45] Tr. at 1123.

discussion about it is ipso facto incriminating. The suspect's mere presence in an ostensible "fencing" location with an item which is being offered for sale at a fraction of its face value provides more than an adequate basis for further investigative action—namely, recording the suspect's conversations about the contraband item. In the present investigation, the circumstances are fundamentally different because there is nothing inherently illegal about either the nature of the meeting place or the general topic of conversation. Indeed, absent specific facts to the contrary, there is an initial presumption of legality because of the positions which the suspects occupy and because of the ostensibly legitimate nature of the things under discussion—whether those things be the operation of a business, economic development in a particular area, or the protection of the human rights and indeed the very life of a foreign national who is touted as nothing more than a legitimate entreprenauer. Hence, the decision for further investigative action cannot be controlled by the criteria which govern such decisions in a conventional "sting" operation, but must depend instead upon the demonstrable existence of special facts which infect the particular transaction with illegality.[36]

In another memo Mr. Stewart emphasized the extent to which Abscam deviated from a conventional sting operation:

> Usually, there is little or no evidence that the offical knows anything about the intermediaries' representations. There may be little, if any, extrinsic information which would suggest that the particular offical is corrupt. On the contrary, most of the officials begin the conversation with disclaimers of criminal intent and offers to handle the problem in a perfectly correct and lawful manner. The Undercover Operatives then press, and they dangle large sums of money in front of the official—initially with promises that he will never be required to deliver the quid pro quo because the payment is only insurance against a remote contingency. The official relents and accepts the payment—in some cases offering to perform further criminal acts, in others without providing additional evidence

[36] *Myers* due process exhibit 15 at 3-4.

of predisposition or criminal intent. In several cases the payment was refused.

All of this is very different in kind and quality from a conventional sting operation.[37]

Persons at the upper levels of the Department of Justice and the FBI apparently assumed that the Congressman who would show up at the townhouse, or at any other meeting place they chose, would have already agreed to take a bribe directly or indirectly, and have thus characterized the Congressman's actions as "self-selecting." However the operatives had no reason to believe that, at least so far as Kelly is concerned, since the script given to Ciuzio had both legal and illegial bait; and Kelly's appearance at the townhouse did not indicate which type of bait he was responding to.[38] As a matter of fact, the operatives in the field did not believe that Kelly came for the purpose of getting a bribe. Weinberg testified that the reason he was not going to give the money to the middlemen as conduits for the Congressman was because he believed that if he did so "[t]he would go north with it" and the Congressman would never know anything about it.[39] He also said: "I believe if we gave him [Ciuzio] the money he would have kept the money."[40]

Although the Department of Justice and the FBI disavow any purpose of testing the virtue of members of Congress,[41]

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[37] *Myers* due process exhibit 16 at 8-9.

[38] At least one public official came to the townhouse without any criminal intent. Senator Larry Pressler came to the townhouse and left when he discovered that a bribe was involved. It is difficult to understand how the government can characterize this procedure as "self-selecting" when it does not know what reason has brought a public official to its door. *See* tr. at 1389.

[39] Tr. at 3809.

[40] Tr. at 3817.

[41] FBI Director Webster said, "We are not in the business of testing morality." *Myers* due process exhibit 110 at 50.

that in fact appears to have been the sole objective of the operation. In the case of the defendant Kelly the evidence points unwaveringly to this conclusion. Given the concession that there was not even a scent of suspicion of criminal conduct, past, present, or imminent, or of criminal behavior by Kelly or any other individual, that no investigation in this regard was underway,[42] and the firm belief that if Ciuzio got his hands on the money the Congressman would never know anything about it, no other objective can emerge except that of testing virtue, or as Judge Kaufman stated in *Alexandro*, "to test the faith of those in the high echelons of government."[43] Either that, or the patently unacceptable objective—prosecution for the sake of prosecution.

III.

As Judge Newman observed in *Myers*, this added dimension to the law enforcement process, "inevitably raises sensitive issues of public policy and public law."[44] If called upon to debate the wisdom and/or propriety of accepting this notion as an added function of law enforcement in our system, I would unhesitatingly urge that it not be done. I readily admit that the notion is offensive to me. Government agents, hard about the business of corrupting public officials who are free of suspicion, essentially subvert our government; and on its face this presents an unwholesome spectacle. This is particularly true with respect to the manner in which Kelly was handled.[45]

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[42] *See* note 33 and accompanying text.

[43] 675 F.2d at 43.

[44] *Myers*, 635 F.2d at 934. That court expressly reserved judgment on the due process claim. *Id.* at 938 n.6.

[45] On January 7, 1981 at a bench conference during the trial of this case, I expressed strong disenchantment when I said: this case "has an odor to it that is going to be cleared away before anybody gets convicted. It has an odor to it that is absolutely repulsive. Let's get along with the trial. . . . But it stinks." Tr. at 2547.

I am aware of the admonition to trial judges that they are not privileged to dismiss a case against a criminal defendant because they do not like the case or because they have some strong personal aversion to the government's conduct, and that this standing alone is not a sufficient basis for determining that such conduct is outrageous to the point of depriving a defendant of due process.[46] But, at the same time, it is inevitable that a strong visceral reaction provides the starting point or triggering mechanism which ultimately leads to the assessment that condut is so outrageous that it transcends any standard of fundamental fairness. Aware that what is repugnant to me may not be repugnant to the Constitution, I have sought to identify some discernible line between that conduct which arouses my personal resentment, and that which falls short of minimal standards of fairness.

To identify that line I need not resolve the debate over the validity of virtue testing because it is not necessary for the disposition which I make of this case. Assuming *arguendo* that this new function of law enforcement is an acceptable proposition, the application of the testing procedures in this case patently exceeds the outer limits of any concept of fundamental fairness.

The litmus test—or temptation—should be one which the individual is likely to encounter in the ordinary course.[47] To

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[46] *Hampton* v. *United States*, 425 U.S. 484, at 490, 96 S.Ct. 1646 at 1650, 48 L.Ed.2d 113 (plurality opinion of Rehnquist, J.), 494 (Powell, J. *concurring*); *Russell*, 411 U.S. at 435, 93 S.Ct. at 1644.

[47] Assistant Attorney General Philip Heymann testified before the House Judiciary Subcommittee on Civil and Constitutional Rights in hearings, immediately after Abscam became public, that it is a "guarantee of fairness" to the individual when the transaction is modeled after reality "because it means that anybody who is brought in, is brought in with the same type of temptations that we know is floating out there." *Myers* due process exhibit 110 at 34. Director Webster agreed. *Id.* at 64. No one in the FBI knew that any Congressman was illegally selling his vote. And, of course, no one knew that anyone was offering a Congressman money *after* he had agreed to something for legitimate reasons.

offer any other type of temptation does not serve the function of preventing crime by apprehending those who, when faced with actual opportunity, would become criminals. Instead, it creates a whole new type of crime that would not exist but for the government's actions.

When improper proposals are rejected in these virtue-testing ventures, the guinea pig should be left alone. In ordinary real life situations, anyone who would seek to corrupt a Congressman would certainly not continue to press in the face of a rejection for fear of being reported and arrested. The FBI of course had no such restraints in this case.

After Kelly rejected the illegal part of the offer when Ciuzio first proposed it, that should have ended the matter. However, since the government did not make this first offer through an official, nor did it monitor Ciuzio when he made the offer on behalf of the government, it did not know that Kelly had already rejected the pay-off.

If the government did not end the testing of Kelly when he rejected Ciuzio's offer because of its ignorance of Kelly's response, it should have ended the testing when Ciuzio reported to Amoroso and Weinberg on January 8th, in vehement language, that Kelly had rejected the offer and insisted that no offer be made.

Finally, after the government heard Kelly himself reject Amoroso's offer, with the words "I got no part in that," the testing should have ended. Since the government made its initial offer through Ciuzio, it had no way of knowing whether Kelly was just "being cute" or was in fact rejecting the offer. However frail one's integrity might appear, it should not be subjected to repeated assaults because of some overzealous attorney's cynical determination that the person is just "being cute." In the absence of any credible evidence that the show of integrity is some kind of ploy, or some evidence that criminal conduct has been committed by the target, he should be deemed to have passed the test.

Recognition of this minimal standard of fundamental fairness apparently prompted FBI Director Webster, according to Assistant Attorney General Philip Heymann, to direct the agents to be sure that they turn away anyone if there was any ambiguity about whether he was at the townhouse to take hundred dollar bills in exchange for a legislative act.[45] Whether this was out of deference to a defendant's rights, or out of a desire to safeguard their prosecution, the result is the same. This balance which the government itself has struck leaves me

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[45] The obvious possibility that a Congressman might be brought into the Abscam lair despite his complete lack of criminal intent was anticipated by some people in the Department of Justice and the FBI. Assistant Attorney General Philip Heymann met with FBI Director William Webster in approximately September 1979 and discussed the possibility. Heymann has testified that they were concerned

> that nobody was being led into something by mistake and we were satisfied that the situations we were creating looked unmistakenly corrupt.
>
> We I think after that meeting reiterated directives which go out to the prosecutors from me and the agents from Webster to just be sure that we—I think it was this clear and I think it's the way Judge Webster put it—"*Be sure that we turn away anybody if there's any ambiguity about it, if we are not sure that the guy is coming in to take hundred dollar bills for a legislative act, turn him away.*" [*United States* v. *Jenrette*, Cr. No. 80-289 (D.D.C., due process transcript of May 14, 1981 at 816-17) (emphasis added).]

It is obvious that Amoroso knew nothing about this precaution (*see* text accompanying note 26 *supra*). In fact he testified that his superiors gave him almost no legal or other instructions on how to conduct meetings with Congressmen. He was never instructed on the law of entrapment. *Myers* due process tr. at 3924, 4131; *Jenrette* trial tr. at 583. He did not recall discussing the elements of the crimes of bribery or conflict of interest. *Myers* due process tr. at 3937-39. Most astonishingly, he testified he received no instructions from his supervisor, John Good, and that he was operating freely and on his own, tr. at 1191; *Myers* due process at 3924-25; and that no one ever told him that if a public official said he did not want money for an official act he was to terminate the contact. Tr. at 1182. The only direction he got was the attorney's calls from downstairs urging him to press on.

comfortable with the feeling that my decision to set aside the conviction of Kelly is based on something more than just an admittedly strong personal sense of revulsion. It is all the more comforting to know that the Department of Justice and the Bureau apparently are willing to live with this dividing line and do not regard it as a handcuff on valid police authority.

It may be that the initial rejection does not mean we have an entirely saintly public servant who does not "lust in his heart," and who is not just "being cute." Moral rectitude, fear, uncertainty, or some other reason may prompt it, but a rejection, sincere or otherwise, in the ordinary course of conduct insulates the official from corruption, and this is society's great interest.

Obviously we like to think, and we hope, that our Congressmen and Senators, and indeed all public servants, are strong enough to withstand any imaginable pressure and reject any type of temptation no matter how attractive, and walk away. When they succumb to temptation we are disappointed and chagrined, as I was at the sight of Kelly stiffing $100 bills into his pockets. But in reality, the hard fact is that our public servants are not recruited from the seminaries and monastaries across the land and that they are plagued by the frailties of human nature.

Indeed, the Congress recognized this as a fact when it enacted the statutes (specifically mentioning Members of Congress) which make it a criminal offense for anyone to give, offer, or even promise anything of value to any public official in order to influence his official conduct and also for a public official to ask, receive or agree to receive anything of value in return for his official acts.[49] Thus, both parties to the transac-

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[49] 18 U.S.C. § 201. Bribery of public officials and witnesses.

(a) For the purpose of this section:

"public official" means Member of Congress . . . .

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any

tion are constrained. This statute obviously was not enacted in the hope that it would be violated. It has no purpose to bring out the best there is in a person, but rather to inhibit the emergence of the worst in him, and thus protect the system. The rare instances of known breaches have been met head on by firm, vigorous prosecutions which have undoubtedly served the exemplary purpose of deterrence.

Assuming *arguendo* that public officials need even more attention from law enforcement of the type we are dealing with in this case, it should be done within the context of the purposes and efficacy of the statute. Since the statute penalizes both parties to a bribe, it is highly unlikely that anyone other than a government agent immune from prosecution for violating this

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public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty. . . .

Shall be fined no more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

statute would make repeated flagrant attempts at corrupting a Congressman for fear that the Congressman would notify the FBI. The penalty clause in the statute is a strong deterrent for such conduct. If no one except the FBI can make such persistent attempts, this procedure does not catch criminals, but creates them.

What the government attorney perceived as "being cute" may very well have been a brief victory of conscience over temptation which was a direct result of awareness of that penalty clause. I believe that in the circumstances of this case, any further pursuit and pressure on the part of government agents was nothing short of outrageous. A suspicion-free subject should be exempted from further testing on the basis of winning the first battle against temptation. He should not be required to win a prolonged war of attrition against chicanery. "Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime."[30] If the government had no knowledge of Kelly doing anything wrong up to his rejection of illicit money, its continuing role as the third man in a fight between his conscience and temptation rises above the level of mere offensiveness to that of being "outrageous." No concept of fundamental fairness can accommodate what happened to Kelly in this case.

IV.

I am keenly aware that the delineation of the conduct circumscribed by the due process defense is elusive. As the Third Circuit said, there is a tendency for the due process defense to overlap with the entrapment defense.[31] However, I am satisfied that this is one of the rare cases where there is a role for the court that the jury cannot and should not play. To identify that role, I return to basic principles.

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[30] *Sherman*, 356 U.S. at 384, 78 S.Ct. at 826 (Frankfurter, J. *concurring*).

[31] *Jannotti*, at 608; *Hampton*, 425 U.S. at 494-95, 96 S.Ct. at 1652 (Powell, J. *concurring*)

The function of law enforcement is to prevent crime and catch criminals. Conversely, law enforcement exceeds its bounds when it manufactures crime and creates criminals. The manufacture of crime and creation of criminals have been specifically prohibited by numerous cases.[32]

The entrapment defense furthers this policy of preventing convi[illegible]ns of the "unwary innocent"[33] by inquiring first, whet[illegible] the defendant was induced by the government to commit the offense, and, second, whether he was predisposed to commit it.[34] In most cases,the entrapment defense alone insures that the government does not successfully prosecute cases where it has manufactured crime or made criminals. For example, where it is not illegal to propose the commission of the criminal act, repeated urgings to commit the crime are appropriately and adequately considered within the context of the jury's inquiry as to whether those urgings constituted "inducement" and whether the defendant was predisposed to commit the crime.

In rare cases, the jury's analysis of pre-disposition is not alone dispositive of the question of the government's involvement in the manufacture of the crime. Trial courts have been cautioned that rather than by general rules, a determination of whether due process violations are fatal to successful prosecution shall be made on a case by case basis, depending on the particular circumstances in each one. In discharging this obligation in the case at bar, the starting point is an examination of the statute itself—its purpose and effect. The statutory scheme precludes even the predisposed from committing the crime under real-world circumstances after the target makes one refusal. This situation contrasts sharply with the situation

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[32] *Russell*, 411 U.S. at 434, 93 S.Ct. at 1644, *quoting Sherman*, 356 U.S. at 372, 78 S.Ct. at 820, *citing Sorrells*, 287 U.S. at 442, 53 S.Ct. at 212.

[33] *Sherman*, 356 U.S. at 372, 78 S.Ct. at 820.

[34] *United States* v. *Burkley*, 591 F.2d 903 (D.C. Cir. 1978).

in *Russell* where the Court specifically noted that the government agent did not violate any federal statute.[55] Where the government's overtures to the defendant fail substantially to model real-world behavior, the results of the government conduct, while satisfying the technical elements of the bribery statute, constitute a crime which would never otherwise occur.[56] Absent the government's conduct in this case, Kelly, even if predisposed, would have had no opportunity to act upon his predisposition in the way he did. Determination that government overtures which produce such an opportunity are not fundamentally fair because they do not comply with the real-world workings of the statute is not something which the jury has been instructed to consider and must therefore be considered by the court. Due process focuses on whether "fairness has been denied an accused in light of all the circumstances."[57]

The broader focus of the due process defense—beyond inducement and predisposition to, in this case, an examination of government conduct in light of the statute allegedly violated—precludes governmental conduct which so deviates from real-world constraints that it results in a crime which would never have reached fruition but for the government's involvement. Governmental manufacture of crime in this sense is as odious, and as prejudicial to a target's rights, as is the governmental snaring of the "unwary innocent" which we term entrapment.

To reiterate, I do not believe that testing virtue is a function of law enforcement. But this personal belief aside, and assuming that it is, the method of testing must be fair. If after an illegal offer is made, the subject rejects it in any fashion, the

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[55] 411 U.S. at 430, 93 S.Ct. at 1642.

[56] The Court in *Russell* was careful to point out that the key ingredient in the drug manufacture, which was supplied by the government, was obtainable from other sources. 411 U.S. at 431, 93 S.Ct. at 1642.

[57] *Hampton*, 425 U.S. at 494 n.6, 96 S.Ct. at 1652 n.6 (Powell, J. *concurring*).

government cannot press on. Certainly when a person recognizes the difference between the legal and the illegal, and rejects the latter, the person should be free of further testing by a device which only government agents could have the audacity to use in the face of the penalties provided for their conduct. This standard creates a workable, discernible line separating the merely offensive and constitutionally impermissible. Crossing this line is patently outrageous. A person corrupted under circumstances which only police officials can create or by a process which only the authorities are licensed to use, has been made into a criminal by his own government.

VI.

At the outset, defendants Weisz and Ciuzio made motions to sever on the basis of Kelly's anticipated defense. During the trial, these defendants made several motions for a mistrial and severance for reasons which were not frivolous. Each time, the court sought to repair the damage with curative instructions to the jury. But upon consideration of this circumstance, the disparity in the amount of evidence as it related to Kelly on the one had and the defendants Weisz and Ciuzio on the other, and in light of the defendant Kelly's bizarre defense* and the

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* During the course of the trial, in an apparent attempt to escape conviction and at the same time hang on to some remnant of respectability, Congressman Kelly presented the bizarre, nearly farcical defense that he was conducting his own investigation of the reason why he had been surrounded by shady characters. He suggested that he was being targeted for destruction by his political enemies who resented his independence and courage in the political arena. Not a scintilla of evidence which would support this theory ever surfaced in this case.

However, as the case unfolded, I was plagued with the unsettling realization that with this loose cannon rolling around on the deck of the criminal justice system such a thing could indeed occur. Also, I became aware that even if a victim successfully invoked the defenses of selective prosecution and/or entrapment, this would be of little solace to him, for he nevertheless has been destroyed as a voice in

manner in which it was put forth, I conclude that Weisz and Ciuzio were prejudiced to the point they should be granted a new trial:

An appropriate order will be entered.[59]

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public affairs. This great potential for a type of mischief, which hopefully will always remain alien to our system, standing alone, may be a compelling justification for outlawing the government's conduct against Kelly as a law enforcement procedure. If we condone such a measure, the fall-out might well be intolerable for us all.

[59] Application has been made to reopen the due process hearing based on allegations contained in the affidavit of the late Mrs. Cynthia Marie Weinberg. The relevance of this material to the task before the court is not clear. In any event, in light of the disposition of this case and the reasons therefore, the motion will be denied.